162 U.S. 1

Office Supreme Court, U. S.
FILED.
NOV 26 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES

VS.

THE STATE OF TEXAS.

BRIEF OF EDGAR ALLAN,

Special Assistant to the Attorney General,

for Complainant.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.

Supreme Court of the United States.

THE UNITED STATES

v.

THE STATE OF TEXAS.

No. 4

Brief for United States.

Statement of Case.

This is an original suit filed in this court under the authority of § 25 of an act of Congress, to provide a temporary government for the Territory of Oklahoma, approved May 2, 1890. The object of the suit is to determine the question of jurisdiction and sovereignty over the territory between the North and South Forks of Red River and east of the 100th meridian—the disputed question being the true boundary line between the United States and the State of Texas, so far as the point where the Red River of Natchitoches intersects the degree of longitude 100 west from London, 23° from Washington.

The question arising upon the pleadings and evidence may be summed up as follows:

1st. The map of the treaty having laid down the meridian line over 100 miles east of its true location, must the Melish or the true meridian govern in this controversy?

2d. Can the Red River of the treaty be traced to the point of its intersection with the meridian of 100° by using Melish's map of 1818, which is made a part of the treaty?

3d. If there is an ambiguity in regard to the boundary stream, how shall it be solved 75 years after the treaty was made?

4th. Which of the forks of Red River as known to-day conforms the nearest to the Rio Rojo of Melish's map?

5th. Which fork is the main branch of the Red River of Natchitoches?

6th. Has the State of Texas exercised undisputed jurisdiction of the territory in dispute as alleged in the pleadings?

7th. Is the United States estopped by her own acts from now asserting this claim?

8th. Have the boundaries of the territory called "Greer county" been mutually recognized by both parties to this cause, so that the case can be disposed of without the necessity of a resurvey and demarcation of the 100th meridian?

The extent of territory involved in this immediate controversy embraces 1,511,576.17 acres.

Complainant's original bill was filed in October, 1890, to which respondent filed a demurrer and answer. The demurrer, involving questions as to the jurisdiction of the court, was passed upon by the court, and its jurisdiction sustained.

An amended bill was filed by complainant on February 2, 1891, and on March 2, 1891, the defendant adopted the answer to the original bill as an answer to the amended bill.

The act of Congress providing for the prosecution of this suit makes no reference to the origin of the claim or title of either of the parties to this controversy, but merely designates the course through which a final determination shall be had as to the rightful title of certain described ter ritory "claimed by the State of Texas as within its boundary and a part of its land, and designated on its map as Greer county."

Origin of Controversy.

On the 22d day of February, 1819, a treaty was concluded between the United States and Spain, which was ratified and proclaimed on the 22d of February, 1821, under the third article of which treaty it was provided and agreed that—

"The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches or Red River; then following the course of the Rio Roxo, westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence by a line due north to the river Arkansas; thence, following the course of the southern bank of the Arkansas to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818." (P. 47, Record.)

The fourth article of the treaty provided for a commission to—

"Run and mark the said line from the mouth of the Sabine to the Red River, and from the Red River to the river Arkansas."

These lines were not run during the Spanish control over Mexico, and on April 5, 1832, Mexico having become a separate and independent government known as The United Mexican States, a treaty was ratified and proclaimed between the United States and Mexico declaring the said treaty of 1819 "still in force, and binding between the United States of America and the United Mexican States." (P. 49, Record.)

Under Mexican control over Texas this boundary line still remained undefined, and Texas having become a separate republic, a treaty was entered into between the United States and the Republic of Texas, which was concluded April 25, 1838, declaring the terms of said treaty as to boundary "binding upon the Republic of Texas, the same having been entered into at a time when Texas formed a part of the United Mexican States." It contained among other provisions, the following:

"ARTICLE II.

"And it is agreed that until this line is marked out, as is provided for in the foregoing article, each of the contracting parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised, and that the remaining portion of the said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise, without the interference of the other within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised." (P. 49, Record.)

In the following year, 1839, the eastern boundary was run by duly appointed commissioners from the mouth of the Sabine to its intersection with the parallel of 32° north latitude, and from that point by a line due north to Red River.

It appears from the evidence of the secretary of that commission that the term " all as laid down in Melish's map " was ignored so far as the ascertainment of the 32d parallel was concerned; that the true point was ascertained, and determined, and a range of townships was thrown into Texas by that determination.

In the year 1841 this witness, who acted as secretary for both branches of the joint commission, had never seen the treaty map, and it does not appear to have been before the commission at all. (See H. P. Bee, q. 10 and 11.)

No further action was taken to mark the boundary lines under said treaty when Texas, under the joint resolution of the Congress of the United States, approved December 29, 1845, was admitted as a State of the Union, with the following guaranties, to wit:

"*First.* Said State to be formed subject to the adjustment by this Government of all questions of boundary that may arise with other governments. * * *

"*Second.* Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes and dues of every kind which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to be-

come a charge upon the Government of the United States." [Extract from the Articles of Annexation of Texas (p. 44, vol. 1, Laws of Texas, fourth edition—Paschal's Annotated Dig.)]

It is from this date, then, (December, 1845), that the question of territorial rights under the treaties aforesaid became a question for determination between the parties to this cause.

As we shall show hereafter, not only were the map-makers and geographers of the treaty period absolutely ignorant in regard to the streams and physical features of the country beyond two or three hundred miles west of the present line of Louisiana, but as late as the year 1852 the celebrated engineer and explorer, Capt. R. B. Marcy, who, in conjunction with Lieut. Geo. B. McClellan and others, explored this Red River region, gives the following description of the difficulties attending his own efforts to obtain reliable information on the subject:

"During this time my attention was frequently called to the remarkable fact that a portion of one of the largest and most important rivers in the United States, lying directly within the limits of the district I had been examining, remained up to that period wholly unexplored and unknown, no white man having ever ascended the stream to its sources. The only information we had upon the subject was derived from the Indians and semi-civilized Indian traders, and was, of course, very unreliable, indefinite, and unsatisfactory; in a word, the country embraced within the basin of Upper Red River had always been to us a *terra incognita*. Several enterprising and experienced travellers had at different periods attempted the examination of this river, but as yet none had succeeded in reaching its sources.

"Hence it will be seen that up to this time there is no record of any traveller having reached the sources of Red River, and that the country upon the headwaters of that stream has heretofore been unexplored. The Mexicans

and Indians on the borders of Mexico are in the habit of calling any river the waters of which having a red appearance 'Rio Colorado' or Red River, and they have applied this name to the Canadian in common with several others; and as many of the Prairie Indians often visit the Mexicans, and some even speak the Spanish language, it is a natural consequence that they should adopt the same nomenclature for rivers, places, etc. Thus, if a traveller from New Mexico were to inquire for the head of Red River, he would most undoubtedly be directed to the Canadian, and the same would also be the case in the adjacent Indian country." (P. 96, Record.)

The Melish Meridian.

We have stated that the territorial limit of the present controversy applies only to the so-called county of Greer; but the answer of the defendant (p. 11, Record) gives notice to the plaintiff that she claims under the treaty rights referred to in this suit, not only Greer county, "but a large part of the lands now belonging to the Chickasaw and other tribes of Indians, under concessions by treaty, as well as a portion of the present States of Kansas and of Colorado, and a part of the Territory of New Mexico," and asserts and insists that the line of the one hundredth meridian of longitude west from London was not necessarily the true line of said meridian as the same might thereafter be fixed and determined by actual survey and calculation, but the line of said meridian "as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818." A rough estimate of the territory thus claimed by the State of Texas would be an area of about 110 miles by 240 miles, exclusive of a portion of Kansas, Colorado, and New Mexico.

This contention for the meridian as laid down by Melish seems remarkable in view of the silence on the part of the

State of Texas during the making and carrying out of the numerous treaties with the various Indian tribes which have been made touching the lease, sales, settlements, and allotments of the lands lying between 98° and 100° west longitude, and north of Red River; the organization of Kansas as a Territory in 1854; her admission into the Union in 1861; the organization of the Territory of Colorado in 1861; her admission as a State in 1876, and the establishment of the boundaries of New Mexico under the treaty of Guadaloupe Hidalgo, and the formation of her Territorial Government in the year 1850.

No reported case, unless it be the recent one of Virginia against Tennessee, exhibits such a series of silent surrenders as those suggested by the attitude of the State of Texas in regard to this vast territory over which she now asserts a claim. This assumption is, however, most extraordinary, when we consider that on September 9, 1850, the following act of Congress was passed and assented to by the State of Texas:

"First. The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte; and thence with the channel of said river to the Gulf of Mexico.

"Second. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

"Third. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and

for compensation or indemnity for the surrender to the United States of her ships, ports, arsenals, custom-house revenues, arms, and munitions of war, and public buildings, with their sites, which became the property of the United States at the time of the annexation.

"Fourth. The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars in a stock bearing five per cent. interest, and redeemable at the end of fourteen years, the interest payable half yearly at the Treasury of the United States." (Pp. 52–53, Record.)

And on November 25, 1850, the legislature of the State of Texas passed an act by which it was provided—

"That the State of Texas hereby agrees to and accepts said propositions; and it is hereby declared that the said State shall be bound by the terms thereof according to their true import and meaning."

By the acts above quoted the northern boundary of the State of Texas commences where the 100th meridian intersects the parallel of 36° 30′. Melish's map is not a factor in this contract. Marcy's survey of 1852 located the meridian west of the forks of Red River, and no question was raised thereat. Jones and Brown, in 1857–'8, marked the line of the 100th meridian as known to-day, and the excellence and correctness of their work were testified to by their superiors (pp. 74–75, Record), and received the unqualified approval of Mr. Wm. H. Russell, the Texas boundary commissioner, in the year 1861 (p. 100, Record). By the second section of the act of Congress aforesaid the State of Texas ceded to the United States all her claim to territory *exterior to the limits and boundaries* set forth in the first article; and if she ever had any title to territory north of Red River and east of the true 100th meridian, it is insisted upon that

such title was extinguished by the act of relinquishment just quoted.

It decides where the northern boundary of the State shall *begin*, and I confess to my inability to work the geometrical problem which can extend the boundary of Texas to any point east of the intersection of latitude and longitude prescribed by these acts and still permit the northern boundary of the State to commence where this law says it shall.

A few years ago the question of what passed to the United States under this relinquishment by the State of Texas was raised touching the title to what was then called No Man's Land, but now designated the Public Land Strip. It arose in *habeas corpus* proceedings brought before this court upon a conviction for murder committed within that territory, and tried before the United States district court of the northern district of Texas. In an opinion containing an elaborate review of the history of and title to the western Territories in general, and the Public Land Strip in particular, the court held that it ceased to be a part of the territory of Texas by virtue of the act of cession aforesaid. (See Cook *v.* U. S., 138 U. S., p. 157.)

If, on the state of facts thus presented, the meridian "as laid down on Melish's map" shall be determined to be the western boundary of the United States bordering on Texas, this controversy would end right here; Greer county would clearly be a part of the State of Texas; and the defendant be remitted to her remedy for the recovery of or compensation for the residue of the vast domain which, under the pleadings in this cause, she claims to be rightfully hers.

Such a position, we think, is wholly untenable; but by operation of the act of 1850 aforesaid, and proceedings had and taken by the boundary commission of 1859–'60, the 100th meridian as recognized by both the United States and Texas since that time is the legal dividing line between the territory of the two governments.

Survey of the 100th Meridian.

Five years afterwards, in the year 1857, the Commissioner of Indian Affairs made a contract with Messrs. Jones & Brown, surveyors, for a survey of the boundary line between the State of Texas and the Choctaw and Chickasaw territory, the evidences of which appear in extracts from field-notes survey of the 100th meridian. (Pp. 73–75, Record.)

The demarcation of this meridian line has been recognized from that time until since this suit was brought by both the United States and Texas as the correct boundary between what is now delineated on all maps as the Panhandle along its entire eastern border.

Under an act of Congress approved June 5, 1858, commissioners were appointed on the part of the United States to act in conjunction with similar commissioners provided for by an act of the legislature of Texas, approved February 11, 1854, which act of Congress reads as follows:

"That the President of the United States be, and he hereby is, authorized and empowered to appoint a suitable person or persons, who, in conjunction with such person or persons as may be appointed by and on behalf of the State of Texas for the same purpose, shall run and mark the boundary lines between the Territories of the United States and the State of Texas. Beginning at the point where the one hundredth degree of longitude west from Greenwich crosses Red River, and running thence north to the point where said one hundredth degree of longitude intersects the parallel of thirty-six degrees and thirty minutes north latitude, to the point where it intersects the one hundred and third degree of longitude west from Greenwich, and thence south with the said one hundred and third degree of longitude to the thirty-second parallel of north latitude, and thence west with the said thirty-second degree of north latitude to the Rio Grande.

"SEC. 2. That such landmarks shall be established at the said point of beginning on Red River, and at the other corners, and on the said several lines of said boundary, as may be agreed on by the President of the United States, or those acting under his authority, and the said State of Texas, or those acting under its authority." (P. 55, Record.)

It is manifest that when this commission proceeded to discharge its functions, in the early part of the year 1860, the State of Texas regarded the meridian line as the true meridian, and the commissioners were required to mark the location of the true lines of longitude as a point in the boundary. This is made clear by reference to the letter of instructions from Gov. Houston to Wm. H. Russell, commissioner on the part of the State of Texas. It was known that the 100th meridian as delineated by Melish was located upon the treaty map some 60 or more miles east of the confluence of the North and South Forks of Red River. It was also known that Jones and Brown had marked the 100th meridian by monuments about 45 miles west of their junction. Yet with these facts in view the commissioner on the part of the State of Texas is instructed by the governor of the State as follows:

"In prosecuting the survey upon a correct basis there can arise but one point of dispute, that is, which of the three forks are to be regarded as the main prong of the Rio Roxo, or Red River. The treaty specifies that the boundary line shall be run according to the limits laid down in Melish's map improved to January 1, 1819.

"It would appear from a reference to Marcy's survey that the three prongs of Red River were traced to their sources; the first, or North Fork, the second, or Middle Fork, running and emptying into the North Fork, and Prairie Dog Town River, or the South Fork of the main prong."

* * * * * * *

"Melish's map of the date hereinbefore mentioned lays down the North Fork as the main prong, and the treaty of limits, also referred to, declares that the boundary line shall be determined as laid down in this map.

"In the prosecution, then, of the survey, you will be guided by Melish's map, and insist upon the North Fork as the main Rio Roxo, or Red River, and as the true boundary line, as described in the treaty of 1819.

"Should the United States commissioner insist upon making the Ke-che-qui-ho-no, or Prairie Dog Town River, the boundary, you will, notwithstanding, co-operate with him in running the line, but you will do it under written protest." (See pp. 100–101, Record.)

Acting upon these instructions, Mr. Russell, on the part of the State of Texas, proceeded to the performance of his duty as a commissioner, and on April 2, 1861, submitted his report to the governor of his State, in which report the following statements are contained:

* * * * * * *

"From this it will be seen that the United States commissioner declined co-operating with the Texas commission in running and marking that portion of the one hundredth meridian lying between the Canadian and Red Rivers. It is true that a United States party had run this line in laying off the boundaries of the Indian agencies or territories, but as Texas was not represented in this work it was the duty of the joint commission to run this line conjointly, as though no survey of it had been made.

"I expressed a willingness and a determination on my part to accept the one hundredth meridian as established by the United States party above referred to, because from the evidence I could get I believed it to be correct; therefore an apprehension that I would insist on a redetermination of the meridian on the part of the United States commissioner is entirely unfounded and cannot be urged as a reason for declining his co-operation.

"It would be proper to show here that the one hundredth degree of longitude as established is correct.

"The astronomical determinations on the Mexican boundary survey made by Maj. W. H. Emory, U. S. Army, are justly regarded as a basis for the minor surveys in the interior of the continent. The one hundred and third meridian, as established by the United States commissioner and my predecessor in office, was transferred from one of the determinations above alluded to, and afterward corrected by its prolongation from the Kansas boundary survey, as determined by Colonel Johnston, U. S. Army; then, as the connection between the one hundredth and one hundred and third meridians is perfect, both directly agreeing with the determinations on the Mexican and Kansas surveys, the one hundredth degree of west longitude may be regarded as one of the most accurately established points in any of the interior surveys.

"Having determined to accept the one hundredth meridian, I commenced tracing it southward from its intersection with the Canadian River on the 10th of June, and finished it to the north prong or main Red River on the 13th of the same month.

* * * * * * *

"Arriving at the parallel of 36° 30′ on the evening of the 19th of June, I found that the intersection with the one hundredth meridian, forming the northeast corner of the 'Pan Handle,' had been determined and fixed by the United States party. I accepted this point as established, because there could possibly be no doubt of its correctness, as the observations were made with a very valuable and costly zenith telescope for the space of near one week.

* * * * * * *

"About the 1st of October, 1860, I received from the Department of the Interior of the United States a map of the survey of the one hundredth meridian, made by the United States party hereinbefore alluded to during the year 1859, which, together with copies from Melish's map referred to in the treaty of 1819, and in the instructions of his excellency Governor Houston, is herewith submitted, marked, respectively, F and G.

"It will be seen by reference to the map that this survey of the one hundredth meridian is extended from the north

boundary of Seminole country, down through Greer county to Prairie Dog Town River, or the south prong of Red River. This line, as surveyed from main Red River to the South Fork, is 50 miles in length, well defined by earthen mounds, and will eminently serve as the western boundary of the above-named county." (See pp. 102–103, Record.)

"WM. H. RUSSELL,
"*Commissioner of Boundary.*"

It was on the foregoing facts that the Secretary of the Interior, Hon. H. M. Teller, in a report to Congress, said: "I am of opinion that the 100th meridian of west longitude has been correctly surveyed, marked, and established, and that a re-survey of that meridian will be unnecessary." (P. 140, Record.)

It may be well here to call attention to the fact that the territory involved in this controversy was never known or designated as a county of the State of Texas until after the appointment of the boundary commission provided for by the act of Congress of 1859; but that while the legislature of Texas had, in the year 1858, fixed the boundaries of the counties of Hardeman and Wilbarger on the south side of Red River, it was not until February 8, 1860, that any distinguishable reference was made in any legislation of the State to the territory which in that year was designated by an act of the legislature as "Greer county."

THE FORKS OF RED RIVER.

When the boundary commission of 1859–'60 dissolved without reaching an agreement as to this part of the boundary, the bone of contention was not the location of the meridian line, but, as will be seen from the report of the Texas commission heretofore referred to, as well as from the letter of instructions from Governor Houston, already

quoted in this brief, it was confined to the question whether the meridian as a boundary running south from the parallel of 36° 30′ should terminate on reaching the North Fork of Red River, or should continue in its course southward to its intersection with what we will term the Ke-che-ah-que-hono, or Main Red River. The former of these two propositions was contended for by the Texas commissioner under instructions from the governor, while the latter proposition was maintained on the part of the United States. (See Rept. of W. H. Russell, p. 100 and pp. 55 to 73, Record.)

It was contended then on the part of Texas that Melish's map laid down the North Fork as the main prong.

In the answer of the defendant in this cause this contention is reiterated. (See p. 14, Rec.). This position was maintained by the State of Texas again through her boundary commissioners, under a subsequent commission, in the year 1886.

Governor Roberts, on August 10, 1883, in a message to the legislature of Texas in relation to Greer county, says :

"I have shown how nearly equal are the claims of each to be called the main branch from facts pertaining to them derived from observation. From this, either one of them, in the absence of the other, would be taken to be the main branch. It may be admitted that the South Fork is the larger and longer, and therefore the main branch in reference to the two nearly equal branches of Red River, and that admission does not settle the fact that the line must run up that branch. The true question is, which one of the two nearly equal branches corresponds most nearly with 'the Rio Roxo of Natchitoches, or Red River,' as it was known in 1819, when the treaty was made, and as 'laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818.' It is not the South Fork, for it is not laid down on

Melish's map, and was not then known to exist by white men, either Americans or Mexicans, who gave any public notice or made any known record of it. Nor was such a fork known to exist before Capt. Marcy was informed of it by his Indian guide, Beaver, during his exploration of 1849, while he was on the headwaters of the Brazos River. (See report of Capt. Marcy.) The Indian called it (not Red River but) 'Ke-che-a-qua-ho-no,' or 'Prairie Dog Town River'" (p. 105, Record).

In the same message Gov. Roberts elaborates his contention that the stream now called Main Red River was not laid down upon the treaty map, and therefore cannot have been in contemplation by the contracting parties at the date of the treaty. (See pp. 140–141, Record.)

Special attention is directed by the governor to the emphasis laid by the boundary commission of 1860 upon the proposition that the treaty map laid down what is now called the North Fork of Red River as the main stream, and the following propositions were contended for by them:

First. The North Fork of Red River was the Rio Roxo of the treaty.

Second. It was known to the framers of the treaty while the South Fork was not.

Third. It was laid down on Melish's map.

Fourth. It was intended by the treaty.

Upon these assumptions the Texas commissioners of 1886 (Mr. G. R. Freeman, one of the counsel in this cause, being a member of that commission) insisted that "*the Rio Rojo of Natchitoches delineated on this map is the boundary* line of the treaty, and if that fact can be determined from this map by the aid of evidence in explanation it is our duty to do so." (P. 163, Record.)

And on page 164, in the same argument, they assert that the Ke-che-ah-que-hono, or main Red River, was certainly

not laid down on the treaty map, "for it was geographically unknown to civilized man 34 years after the map was published. This declaration is widely contradictory of the pleading contained on page 14, Record, in defendant's answer, where it is stated:

"This defendant avers upon information and advice, and will offer proof to support such averments, that at the date of said treaty of 1819 the *physical and geographical condition of the territory under discussion* between the representatives of the high contracting parties to said treaty were well known and understood by at least one of said high contracting parties, to wit, the King of Spain, which information was imparted to the other contracting party before the conclusion of said treaty."

Knowledge of Treaty-Makers.

There is very little in this voluminous record which supports the proposition inferentially that the Spanish authorities had any knowledge of the "physical and geographical condition of the territory under discussion." It is suggested by the following paragraph from the letter of Louis de Onis, Spanish plenipotentiary, to the Secretary of State of United States, December 12, 1818:

"The disastrous expedition of M. de la Salle, the absurd grant in favor of Crozat, and the erroneous narratives of travellers with maps formed at pleasure by uninformed and interested geographers, such as Melish and others, who ran their lines as they were dictated to them, and thus disposed of the dominions of Spain as suited their wishes." (P. 90, Record.)

There is nothing, however, in the record to show what this knowledge was or that it was ever "imparted to the other contracting party."

As late as 1886 the maps of the period, the diplomatic correspondence, and Fragoso's travels constituted almost the entire evidence feebly urged in regard to the knowledge of the treaty-makers.

Considerable evidence, in the shape of translations from ancient Spanish records, has been introduced to support the theory that the country was better known than has been heretofore supposed. It is sufficient evidence against the value as testimony of the itinerary of Fragoso and the Letters of Mezieres to show that the former was not brought to light for 96 years after it was written, and the latter for more than 100 years; that neither of these series of documents was ever printed until now; and that nothing in the correspondence between the governments arouses the suspicion that either of the contracting parties was cognizant of or influenced by what those documents contained.

Even if they show any knowledge of the country in the region of the North and South Forks of Red River, the evidence is abundant that their knowledge was not possessed by Humboldt, Pike, Darby, or Melish, who were the sources of information relied upon in making the treaty in question.

Fragoso passed from the head of South Fork, or Rio Blanco, but his itinerary shows that between July 4th and July 13th he travelled 255 miles to the mouth of Rio de las Plumas (Feather River), which Mr. Cummins, Mr. Pressler, and others say was one of the ancient Mexican names for the North Fork of Red River. He saw the Juamanes or Wichita Mountains (see footnote to p. 731, Record). On the same day, July 13th, he describes the Feather River by saying: "Here another river running from the north joins the Blanco" (p. 910, Record). The next day he travels 30 miles in an eastward course and says: "Again another river, also running from the north, joins the Rio Blanco." This

was probably Cache Creek. Up to July 18th he travels about 100 miles further east and says he "halted on a river running from the north to join the Rio Blanco" (probably the Washita), so that whatever name Fragoso applied to the stream, he did not regard the North Fork as Red River, or White River; but as a tributary of that stream, which bore one and the same name above and below the confluence of the forks, and which he regarded as the river to which the others were merely tributaries.

Nor can we see what light the Letters of Mezieres in regard to his mission in 1778 can throw upon the knowledge possessed by map-makers and geographers of the treaty period.

It is manifest that his route in 1779 was from the Sabine westward, between the Brazos and Colorado Rivers (see pp. 861–873, Record), and that the Tuacana village was in the neighborhood of the Brazos River (pp. 869–870 and 888–890, Record), where he met Indians from the San Antonio mission. In September he was on the Guadaloupe (p. 876, Record). He describes Texas at that time as being entirely south of 29° north latitude, and says that on the north of Texas is an *unknown region* (p. 880, Record), its only settlements—Bexar, the Presidio of La Bahia del Espiritu Santo, and "the unprotected settlements of Bucarely—the throne of poverty and wretchedness" (p. 881, Record).

Indeed, this faithful subject of his royal master demonstrates beyond cavil the impossibility of civilized men overcoming the precautions of the Spanish government to prevent their obtaining a knowledge of that vast western territory (see pp. 893, 881–883, 862, Record; also Pease's History, p. 165, Record). He speaks of the Taoaviase villages, "one situated north of the Rio Bermejo (Red River) and the other opposite," where they raise beans, pumpkins, and irrigate their seeds; and the water so brackish that "the

stock that grazes on the banks is killed at any hour." They have fuel at hand in the cross timbers, which extend 80 leagues in length and 1, 2, or more in width, and *they have a salt bank in the middle of the river*, while they use the quarries to get grindstones and the white stone to make pipes (p. 891, Record).

But it is clear that this writer was describing points on the Canadian River and not upon either fork of the treaty river, or else the North Fork was known *as such* at that early day. He says: "The Rio Bermejo runs from the mountains of New Mexico at about four days' travel from the Tabaoiaces, and forms three forks, which unite near the village. The *North Fork contains the salt bank above referred to.* At the junction there is yet little water except in the risings, which do not last, owing to the swiftness of the stream" (p. 892, Record). These two villages were named San Teodoro and San Bernado. (*Id.* See also extract from Bancroft, pp. 733, 734–736, Record.)

Likewise the translations of manuscript touching the history of the country nearly one hundred years before the date of the treaty (and just discovered in Bancroft's Pacific Coast literary) only contain fragmentary and ambiguous references to the Red River country, which would have required, when the treaty map was made, almost as great a stretch of imagination in comprehending its meaning as was exercised by Melish in following the authorities who led him into the errors he made.

The experience of Pike with Malgares; the description and purpose of Spanish settlements as related by the historian, Pease (p. 165, Rec.); the fact that the Spanish government "carefully kept their knowledge concealed from the world" (p. 146, Rec.), and above all, the evidence of the recently unearthed correspondence of the Spanish ambassador, Louis De Onis, with his superior, in regard to

this very treaty, establish beyond a doubt the purpose to withhold from the other contracting party even the meagre knowledge the government of Spain may have derived from the travels of Mezieres and others through the Indian desert. These documents, now public, but heretofore secret archives, unfold in a new light the means by which this treaty was consummated. The writer kisses the hand of the intermediary between himself and the King, as he poses in self-laudation over his successful efforts to "flatter passions" and play upon the fears and ambitions of the United States minister, Mr. Adams, who is described as seeing "that not only the Presidency, but the place of Secretary of State is likely to escape him; dreads the accusation of the whole Southern party," and who, under these influences, has already made concessions "really not hoped for" (p. 922-'3-'5, Record).

None of this matter, we submit, has been shown to play any part in the treaty negotiations, and can therefore play no part in the treaty construction. It certainly does not outweigh or even cast doubt upon the admissions of the geographers or map-makers themselves in regard to their comparative ignorance of the country.

The Error of Melish's Map.

Whatever knowledge the King of Spain may have possessed was, however, unknown to Melish, and we think it will appear upon the whole testimony of the case that Mr. Melish had no knowledge or even reliable information as data for his map-work of the country west of Louisiana as her boundaries were fixed under the Constitution of 1812. The testimony is overwhelming to sustain this view, and is largely supplemented by the admissions of Mr. Melish, published with a subsequent edition of his map of 1823.

Indeed, through all the controversy as to the territory in dispute, there has never been a serious contention in any quarter, until this suit was brought, as to the speculative character of all early history of the geography of this western country.

The fact that Texas has so long contended that Melish did not lay down the south fork or main stream on his map is an admission of his ignorance, which at least contradicts any idea that Fragosa's travels, first brought to light in 1886, were known either to *the parties* to the treaty or the maker of the map.

Beginning our researches in this direction with the expedition of Lieut. Q. M. Pike, in 1806–'7, one object of which was an expedition to the Red River country, we find a counter project organized by the government of Spain, under the leadership of an officer named Malgares. (See pp. 79–81, Record.) This party under Lieut. Malgares was, according to Pike—

"(1) To descend the Red River in order, if he met our expedition, to intercept and turn us back, or should Major Sparks and Mr. Freeman have missed the party from Nacogdoches, under the command of Captain Viana, to oblige them to return and not penetrate further into the country or make them prisoners of war.

"(2) To explore and examine all the internal parts of the country from the frontiers of the province of New Mexico to the Missouri between the La Platte.

"(3) To visit the Tetaus, Pawnees Republic, Grand Pawnees, Pawnee Mahaws, and Kans." (P. 80, Record.)

It appears by a reference to one of the photographic maps filed in the cause, called "a chart of the internal part of Louisiana," by Pike that the Red River here referred to was not the Red River of Natchitoches. On that map it appears that the route of the Spanish cavalry was from

near Taos, crossing the Rio Rojo, and thence along the north side of the stream to a point where it took a northeast course and meandered to the Arkansas. On the face of the map is printed: "Above the first fork of the Arkansaw the bank becomes very rough, and, although narrow, carries a quantity of water of a red color, and is the left branch of the Arkansaw, which connects with the Red River of the Mississippi." This stream called Red River was, as we will hereafter show, not the Red River of Natchitoches, but the Canadian. If this be true, then Pike and Sparks and Malgares could only mislead when they were relied upon for information as to the location of the true treaty river.

Humboldt relied upon Pike, and in 1811 he published his "Political Essay on the Kingdom of New Spain," in which, while his prophetic pen predicts that "public coaches will one day roll on from Philadelphia and Washington to Mexico and Acapulco," still describes the country at that time as follows:

"The latest settlements of Louisiana are on a meridian which is twenty-five leagues east from the mouth of the Rio Mermentas. The most northern town is Fort Clayborne, of Natchitoches, several leagues east from the old situation of the mission of Adayes." (P. 83, Record.)

"As there is no Mexican settlement beyond the eastern bank of the Rio Sabina, it follows that the uninhabited country which separates the villages of Louisiana from the missions of Texas amounts to more than 1,500 square leagues." (P. 84, Record.)

Humboldt, referring to his own sources of information, says:

"There remains for us to indicate the maps, almost wholly manuscript, which we have employed for the differ-

ent parts of the general map of New Spain. * * * There is ground for complaint against the inaccuracy with which the eastern coast of Mexico to the north of Vera Cruz has been hitherto surveyed. The part contained between the mouths of the Rio Bravo del Norte and the Mississippi is almost as little known as the eastern coast of Africa between Orange River and Fish Bay." (Pp. 126–'7, Record.)

In 1818 Wm. Darby published a map, and on its face it bears testimony that "the wide range from San Antonio de Bexar to Red River has never been explored by any scientific traveller," while he furnishes the same evidence of ignorance as to the source of Red River that is presented by Humboldt, Pike, and Melish.

Perhaps this map of Darby's shows more conclusively than any of the others named, the limit of information as to the country to the westward. Mr. Darby says:

"We will close this chapter with a review of the northwest section of the State of Louisiana. It is within five or six years past that much of this country was discovered. This may seem almost incredible, but it is really a fact that, in 1811, considerable streams that flow into the Red and Ouachitta Rivers were unknown, except to a few hunters. If this had been the case with rivers remote from the Missippi, the claim in geography would not have excited surprise, but it is certainly astonishing that such watercourses should be unexplored as the Derbane, Saline of Ouachitta, Saline of Red River, Dacheet, Bodcau, Black Lake River, and the Dugdomini, all in the neighborhood of long-established posts. A glance at Lafond's map of Louisiana, published in 1805, will enable any person acquainted with the real features of the country to understand how utterly the country upon the Red and Ouachitta Rivers were unknown at the epoch of the publication of the foregoing map." (P. 85, Record.)

was published later than Darby's, and the material of Bringier's map (never published) was used by Melish, but they gave no information further west than the point then supposed to be the meridian of 100°, for Mr. Melish says:

"Mr. Bringier's map embraced the whole of that part of the Missouri territory known by the name of Upper Louisiana from the northern boundary of the State of Louisiana to above Saint Louis, and from the Mississippi to the twenty-third degree of west longitude. An arrangement was immediately formed with these gentlemen by which the result of their information was incorporated into this map. The old work was accordingly erased from the plates and the new substituted, at great labor and expense. We may add here that Darby's map, with a descriptive volume of new and interesting matter, has been published." (P. 86–'7, Record; see also Chas. Corner, r. d. q. 22.).

THE RIO ROJO IS THE CANADIAN.

In the year 1820 Maj. S. H. Long, of the U. S. Army, completed "an expedition from Pittsburgh to the Rocky Mountains," which was published in three volumes in 1823. The following extracts from his account will show the first dawn of light given to the world regarding the country between the Arkansas and Red Rivers, and from the Louisiana line to the Spanish frontier on the west:

"Red River was explored at a very early period by the French, but their examinations appear to have extended no farther than to the country of the Natchitoches and the Cadoes; and although subsequent examinations have a little enlarged our acquaintance with its upper branches, we are still unfortunately ignorant of the position of its sources" (p. 78, Record).

By referring to pp. 89–94, Rec., the account of this expedition of Maj. Long establishes the fact, beyond peradventure of a doubt, that the sources of Melish's Red River were the headwaters of the Canadian. So vague was the information obtainable at that time that Maj. Long says:

"The river itself, which we supposed to be the Red River of Natchitoches, is a permanent landmark; but it is *a line and not a point*, and aids us only in one direction in our attempts to designate locality."

The map of Maj. Long shows that in his attempt to explore Red River, guided by the maps of the period, he passed from the Arkansas near the 104th meridian, crossing Purgatory Creek, the North Fork of the Canadian, and striking the head of that stream 30 or 40 miles east of Santa Fé; he followed the north side of the Canadian River until he reached its mouth, emptying into the Arkansas. His alternations between hope and fear; reliance upon, and doubts in regard to, his interpreters and guides, are pathetically described in the pages of testimony above referred to. This expedition was commenced in July, 1820, and occupied a period of seven weeks, "travelling with the utmost diligence." At the end of the journey the errors of Humboldt, Pike, Darby, and Melish are made plain in the discovery set forth in the following extract from Long's account:

"September 10 we left our camp at the usual hour, and after riding 8 or 10 miles arrived at the confluence of our supposed Red River with another of a much greater size, which we at once recognized to be the Arkansas. Our disappointment and chagrin at discovering the mistake we had so long labored under was alleviated by the consciousness that the season was so far advanced, our horses and our means so far exhausted, as to place it beyond our power to return and attempt the discovery of the sources of Red River. We had been misled by some little reliance on the

maps and the current statements concerning the position of the upper branches of Red River, and more particularly by the confident assurance we had received from the Kaskaia Indians, whom we did not suspect of a wish to deceive us in an affair of such indifference to them. Knowing there was a degree of ambiguity and confusion in the nomenclature of the rivers, we had insisted particularly on being informed whether the river we were descending was the one on which the Pawnee Piquas had their permanent residence, and this we were repeatedly assured was the case. Several other circumstances, which have been already mentioned, led us to the commission of this unfortunate mistake.

" According to our estimate of distances on our courses it is 796½ miles from the point where we first struck the Canadian to its confluence with the Arkansas. If we make a reasonable allowance for the meanders of the river and for the extension of its upper branches some distance to the west of the place where we commenced our descent, the entire length of the Canadian will appear to be about 1,000 miles. Our journey upon it had occupied a space of seven weeks, travelling with the utmost diligence the strength of our horses would permit." (P. 94, Record.)

It may be well here to call attention to the fact that the Canadian River has always been called by the Mexicans and Spaniards Rio Colorado, and is so designated by them to this day. (See ev. of Romero, p. 417 ; Martinez, p. 1263–'4, and extract from Gregg, pp. 166, 167, Record.)

This will account for the confusion in the nomenclature of the rivers in this region for many years after the true sources of the Red River of Natchitoches were discovered.

Following these discoveries of Maj. Long came the publication of a map of " Mexico and Internal Provinces " by Carey and Lee, in 1822. Attention is particularly directed to the changed delineation of Red River and its tributaries as shown by this map. The forks of Red River appear at about the 99th meridian ; the mouth of the False Washita

a little east of the 97th meridian; the southern branch extends a little beyond the 103d meridian, and is between the 34th and 35th parallels of latitude; while the headwaters of Melish's Red River still bear the names which his map gave to them, still extend north beyond the 37th parallel, still lie northeast of Santa Fé, but describe the northern branch as the "Rio Rojo de Natchitoches or North Fork of Canadian River."

From the time of the publication of this atlas down to the present date no map, so far as we can discover, has disregarded the result of Maj. Long's exploration, or failed to give to Red River a direction which corresponds substantially with the general course of the Ke-che-ah-que-hono, or Main Red River (p. 1007 Record, x-Q. 128). This publication was three years after the date of the treaty, and, while it does not yet appear that any extensive knowledge of this country had been obtained, it must settle the proposition that Melish did not lay down on his treaty map the true sources of the treaty river, but that he joined the Red River of the treaty at some unknown and unascertainable point with the Canadian River.

Melish's Map of 1823.

In the same year, 1822, Mr. Melish published his new work on this subject. He died on the 30th day of December in that year, but in 1823 a new edition of his treaty map was published. In this map the Canadian River receives its proper connection with its own headwaters, while the treaty river has its headwaters just where they appear on modern maps, between parallels 34 and 35 north latitude. In its features of the disputed region of country and the streams adjacent thereto it is almost a counterpart of the Carey & Lee Atlas. The most remarkable feature of

this map is in the fact that the stream which corresponds most nearly to the North Fork of Red River as described by Mr. Corner in his testimony is still an unnamed tributary, while the mountain range lying to the east and north upon the treaty map does not appear upon the improved edition. Mr. Melish himself tells what led to the publication of this later map, and he furnishes evidence in his work published in 1822 that the map of 1823 was the posthumous work referred to by the dying traveller.

In the preface to this work, published in 1822, the author says:

"When the late treaty was negotiated with Spain, which had reference to the map in fixing the southwest boundary, it was determined to bring forward an entire new edition of the map, exhibiting Florida as a part of the United States, and marking all alterations that had taken place in the country up to the time of publication; and from a conviction that Mexico would soon become independent, and would eventually be of great importance to the United States, it was determined to add another sheet exhibiting a complete view of that very interesting country" (p. 87, Record).

He admits that his sources of information are still meagre, and that he uses Humboldt as the basis for the Spanish part of this later map, with the addition of some new material, including the account of Long's expedition. He says:

"*For the Spanish possessions.*—Humboldt's very excellent maps were taken as the basis, and some of the details, particularly in the upper part, were furnished from Pike's travels. Improvements have been made from late Spanish charts and other documents." (Pp. 88, Record.)

On page 380 of his work he says:

"Before describing the Canadian River and its branches, it may be proper to notice that great researches have been

made in the country west of the Mississippi, and particularly in this section of it, under the auspices of the War Department. Major Long and Captain Bell, two very meritorious and enterprising officers belonging to the Corps of Engineers of the United States, explored all the country from Council Bluffs to near the sources of the Arkansas and Platte Rivers. In returning, Captain Bell's detachment descended the Arkansas from the mountain called by Pike the Highest Peak (but which they have called James's Peak) downward; and Major Long's detachment proceeded to the southward, with the view of descending Red River. They entered the river as laid down by the former maps, and descended by its banks, but to their great surprise they found it conducted them into the Arkansas. This discovery led to an entire new view of the rivers in this quarter, and it is found that four large streams exist between the Arkansas and Red River, and some of them rise further west than the Red River." (P. 89, Record.)

These four streams are described by him as the "Canadian Fork," "Canadian Fork North Branch," "Little North Fork," and "South Fork of Canadian River," and then he bears the following testimony to our proposition, that his efforts at delineating the country were mainly speculative, inasmuch as "it had not yet been explored":

"These discoveries have given an entire new view of Red River. It has not yet been explored, but it is *presumed* that it rises in the mountains, *southeast* of Santa Fé, and runs a southwestwardly course for some time, and then, turning eastward, it runs nearly in that direction to the upper settlements of the United States, to which point it has been surveyed. Its comparative course from its source to the western limit of the State of Louisiana is, by this view, about 650 miles; and its length in that State is about 220 miles, making the entire length 770 miles.

"Natchitoches is the most remote town in the United States." (P. 89, Record.)

Col. Dodge's Expedition in 1834.

The itinerary of this expedition, running from June 21st to August 9th, has been quoted by both parties in the Record. He started from Fort Gibson, reached the Washita, and crossed over that stream on July 4th. From that time until July 16th the expedition travelled 157 miles, generally in a westerly and northwesterly direction, when they reached the Comanche village. This camp had only been occupied a day or two (p. 180, Record). It was behind mountains 2,000 feet in height. Between the 17th and 21st of July, when the Toyash village was reached, the expedition marched 72 miles west and southwest. The Toyash village is on a *branch* of Red River 500 feet wide (pp. 181–'2, Record). This village contained about 200 grass lodges; the river runs in front of the village; their corn-fields reached for miles; they raised melons, squashes, etc.; their lodges 30 feet high and 40 feet in diameter, with shallow excavations in centre for fire-places.

The route of this expedition and the location of these villages appear upon the map at page 172, Record, on which is also laid down the route returning eastward.

Mr. Catlin describes the Comanche village as composed of 600 or 800 lodges, and the Pawnee village on the bank of Red River, about 90 miles from the Comanche town, containing some 500 or 600 wigwams (p. 848, Record). He says the Toyash formerly lived south (p. 854, Record). (See Catlin's map, p. 171, Record.)

Gregg describes the Red River for 200 miles above the mouth of the False Washita as conforming much more nearly to the shallow, sandy bed of the South Fork than to the condition of the North Fork from its mouth 36 miles up to Elm Creek (p. 168, Record).

In the defendant's evidence they quote on page 858, Record, from this same author, but the extract rather tends to show that the North Fork was merely considered the "principal *northern branch* of Red River," and this information he obtained from a Comanche guide as familiar with the country "as a landlord with his own premises."

George W. Kendall, in his narrative of an expedition from Texas to Santa Fé, published the very year in which Texas was admitted as a State of the Union, says: "A majority of the map-makers, by joining the Red River, *as far as known*, with some one of the streams rising in the Rocky Mountains, have made a long and very pretty stream as seen upon their charts. Were they to journey along the line of their imaginary river with the hope of finding the water they have traced, I am inclined to believe they would suffer much from thirst before they had crossed the boundless prairie spreading eastward from the outward spurs of the Rocky Mountains" (p. 94, Record).

In the year 1852 Capt. R. B. Marcy was in charge of an exploring party which traversed this region, and made perhaps the most thorough observations from a geographical standpoint that up to that time had been made. He says (p. 96, Record) it was "up to that period wholly unexplored and unknown, no white man having ever ascended the stream to its source. * * * In a word, the country embraced within the basin of Upper Red River had always been to us a *terra incognita*."

In the year 1841 Kennedy's Rise and Progress of Texas was published, and he bore testimony to the want of information respecting the country intervening between the Big Washita and the headwaters of Red River, which he described as a "little explored region."

"No precise information has yet been given to the public

respecting the country intervening between the Big Washita and the headwaters of Red River, which is traversed as a hunting ground by the Comanches and other Indian tribes.

"A survey and field-notes, with other useful manuscript documents, liberally furnished for this work by Mr. Charles Edwards, of New York, enable me to throw some additional light on the topography of this little explored region." (P. 99, Record.)

In the year 1883 Gov. Roberts, of Texas, in a message to the legislature of that State, admits the ignorance of Melish as to the source and location of the upper waters of Red River (see Record, 140 to 143), the last clause of which quotation reads as follows :

"The source of that stream, now known as the South Fork, is at about 34½° north latitude, and after its headwaters collect it runs nearly in a straight course, a little south of east, to the junction. Melish's map of 1818 exhibits no such things, and it is quite certain that the existence of such a stream was then entirely unknown to white men. It is therefore hardly possible that Melish intended to delineate upon his map of 1818 the South Fork as a part of the river then known as Red River." (P. 143, Record.)

And his successor, Gov. Ireland, in a letter to the Hon. Wm. C. Endicott, Secretary of War, dated December 14, 1885, regarding the work to be performed by the joint boundary commission of 1886, thus expresses the opinion in Texas at that late date that both the treaty-makers and the compiler of the map were ignorant in regard to the sources and tributaries.

"It was well known, no doubt, to both contracting parties that Melish's map was not correct. He knew there was a Red River of Louisiana and that it had a source, but

where the source was or the tributaries or branches, if any, were wholly unknown to him and to the contracting parties. This is the conclusion drawn from the language of the treaty." (P. 108, Record.)

Additional evidence on this point is found by a reference to the oft-repeated admissions made by the Texas commissioners in their argument before the joint boundary commission, which will be found from pp. 117 to 121 of the printed record. They discuss the sources of Melish's information; admit that the exact locality of the stream was unknown at the date of the treaty; that it has *since* been found; that the Upper Canadian was then generally considered to be Red River, or one of its sources; and that the true features of the river, its tributaries, course, source, and surroundings, were unknown for many years later on.

A single paragraph is quoted from the argument of the Texas commissioners in 1886 to show the position then taken by them upon this subject. They say:

"12. Again, Melish's map shows two streams rising in the thirty-sixth and thirty-seventh degrees of north latitude, flowing in a southeasterly direction and forming a junction a little west of the one hundredth and first degree of longitude. These streams at and near their junction both take the same course that of the North Fork is now known to have. There is, as stated, no stream noted from the west, on the south for 300 miles of Red River, and none at all to correspond to Prairie Dog Town River. No map prior to this shows such a stream, and the solitary reference to any white man knowing of this Prairie Dog Town River is the expedition of Fragoso, in 1788, from Santa Fé to Fort Natchitoches of Louisiana. He descended the west side of this stream and gave it the name of Rio Blanco, or White River—doubtless from the white earth worked up by prairie dogs and the white sand in the bed of the river. *But these discoveries were not known or published until now.* This information is found in an old Spanish manuscript obtained

by Texas during her provincial days, and filed among the archives of the land office, where it lay until the Texas commission had it translated into English. *It is very evident that it has never been referred to in the history of Texas. It was not known to Melish*, for if he had obtained possession of it he would have laid this river down on his map as Rio Blanco or White River. Nor did Melish's successor, in 1823, show this stream on his improved map. The Mexican government did not have this data published, because Desternell, who made three maps and whose first map was used as the basis of the treaty between the same governments in 1848, did not show the Rio Blanco, or White River. The atlas of Carey & Lea, of 1822, delineating this region of country, shows but one unnamed stream flowing into the Red River from the south, thus admitting clearly that this fact was not known." (Pp. 119, 120, Record.)

Thus is the record in this case pregnant with evidence that the region of country in controversy and for a radius of hundreds of miles around the same was absolutely unknown to civilized man at the date of the treaty, so that no intelligent delineation could be made or information given by the treaty map; and but for the persistence with which it is urged by the defence that the Rio Roxo of Melish's map represents the North Fork of Red River, we would confine ourselves to the proof that neither one of the forks in controversy was laid down with a knowledge of its existence or locality, but that any line purporting to delineate the same was purely imaginary.

Mr. Thos. Jefferson in 1806 said the examination of Red River was but just commencing (p. 738, Record). And Mr. De Onis (pp. 916–'18, Record) bewails the difficulties in the pathway of his government from the fact that the records defining the original boundaries of Louisiana were delivered to France without keeping a copy of them.

Can the Map Aid Us?

We maintain that the Rio Roxo of the treaty map coincides more closely with the Ke-che-ah-que-hono, or Main Red River, than with the North Fork of that stream.

Maj. J. W. Clous, for over 30 years an engineer officer in the U. S. Army, and between the years 1868 to 1885 attached to several expeditions in the Red River country, says in answer to direct question 13: "In the neighborhood of the 98th meridian, as near as I remember—I merely speak from recollection—there is a semblance of a river running approximately in the direction that the Red River does, but is located about *a degree of latitute farther south* than the Main Red River."

Maj. Wm. R. Livermore, an engineer officer of the U. S. Army for nearly 30 years, is, as stated in his testimony, an officer of much experience in map-making; was one of the United States Commissioners on the Texas boundary commission of 1886; was familiar with the maps bearing upon this controversy. After explaining a number of discrepancies between the upper waters of the treaty river and the Red River as known to-day, this witness testifies as follows:

"31 Q. Which of the two forks, the north or the south, agrees more nearly with Melish's stream in the vicinity of the 100th meridian?

"A. The Prairie Dog Town Fork.

"32 Q. State the points of agreement between the two at that point.

"A. The course of the Prairie Dog Town Fork resembles more closely the general direction of Melish's stream at the 100th meridian than the North Fork. The South Fork agrees more nearly in direction than the North Fork. It also agrees more nearly with the general course of the river than the North Fork.

"33 Q. Have you ever made any measurements as to the points of difference between these two streams?

"A. Yes; at one of the early meetings of the boundary commission, to enable us to determine or form some opinion as to which fork agreed more nearly with the position of the river as laid down in Melish's map, I made certain measurements of angles and distances—very rough measurements, but sufficient to show which corresponded more nearly in latitude and in direction with the Red River as laid down on Melish's map.

"34 Q. Have you done anything since you knew you would be a witness in this cause to refresh your memory as to the points of difference alluded to?

"A. Yes; this morning, so far as possible with the means at my command, I made a rough verification of those measurements, angles, and distances.

"35 Q. State, if you can, how far the position of the North Fork of Red River lies north of the stream laid down on Melish's map as Red River.

"A. About 80 miles, taking the latitudes as the standard.

"36 Q. And how far is the South or Prairie Dog Town Fork?

"A. Between 40 and 50 miles, in general terms.

"37 Q. Can you say how far the North Fork from the 100th meridian to the junction of the fork differs in direction from the stream on Melish's map?

"A. The North Fork, about 34 degrees.

"38 Q. How about the Prairie Dog Town Fork at the same point?

"A. About 10 degrees.

"39 Q. What is the difference from the 100th meridian to the 99th meridian?

"A. The North Fork differs in direction about 30 degrees and the South Fork virtually no degree.

"40 Q. And how is it from the 100th meridian to the 98th?

"A. The North Fork 13 degrees and the South Fork 8 degrees 30 minutes.

"41 Q. How is it beyond this point eastward?

"A. Beyond this point the Prairie Dog Town Fork corresponds more nearly than the North Fork.

"42 Q. Can you give the differences in point of angles,

taking it from the 100th meridian to the junction of those forks—say, first, from the 100th to the 98th meridian?

"A. From the 100th to the 98th meridian the North Fork makes an angle of about 45 degrees with the general course of the river; the South Fork, four and one-half degrees.

"43 Q. How is it from the 100th meridian to the 97th?

"A. The North Fork, 47 degrees; the Prairie Dog Town Fork, virtually nothing.

"44 Q. And how from the 100th to the 96th meridian?

"A. The North Fork, 51 degrees; the Prairie Dog Town Fork, 4½ degrees.

"45 Q. Are the statements you have just given the result of your recollections of what you did years ago, or of the recent examination and measurements you have made?

"A. They are the result of a rough examination made this morning.

"46 Q. I will ask you here from what authorities you obtained data and information upon which you based the black line upon the red and black maps you have been referring to?

"A. I think these lines were reduced from the latest map of the engineer department accessible at that time. I find that they essentially correspond with those on this map (Exhibit Map No. 8 in the series of 23 maps).

"47 Q. And what is that map (Exhibit Map No. 8)?"

Lieut. LANSING H. BEACH, instructor of engineering at the U. S. Military Academy, West Point, N. Y., was secretary of the boundary commission of 1886. He testifies on this point as follows:

"38 Q. I see you are now looking at the red and black map marked Exhibit Map No. 11. What does that show as to whether the North or South Fork agrees more nearly with Melish in the vicinity of the 100th Meridian?

"The WITNESS: By the South Fork do you mean what is marked as Prairie Dog Town Fork on this map?

"Mr. ALLAN: Yes.

"A. The Prairie Dog Town Fork agrees more closely with Melish's Red River than the North Fork in latitude and direction of flow.

"39 Q. At that point how far is the North Fork north of the stream as laid down on Melish's map?

"A. About one degree and 20 minutes.

"40 Q. Can you state it in miles approximately?

"A. That would make it approximately 80 miles, using 60 miles to a degree.

"41 Q. How far north does the Prairie Dog Town Fork appear?

"A. About 40 minutes, or, in miles, about 40.

"42 Q. Can you state how and by whom that red and black map was prepared?

"A. This particular map was traced from the original red and black map before the joint commission by Edmund Moeser, draughtsman at the time in the Cincinnati engineer office. The original red and black map used before the commission was made by Major Livermore, Lieutenant (now Captain) Casey, and myself.

"43 Q. You stated on yesterday afternoon, in answer to question 42, that the original red and black map was made by Major Livermore, Lieutenant Casey, and yourself; please state what system in superposing you adopted for the map referred to.

"A. Melish's map was drawn—that is, so much of it as is contained in Exhibit Map No. 11; then the corresponding portion of Exhibit Map No. 8 was platted over it, Exhibit Map No. 18 being changed in method of projection and scale to conform to the Melish map of 1818, from which the first part of the red and black map was taken.

"44 Q. When you speak of the position in which they were placed, do you mean in relation to localities, or latitude and longitude?

"A. The black portion of the map taken from Exhibit Map No. 8 was platted by latitudes and longitudes. Localities are determined by latitude and longitude more accurately than in any other way.

"45 Q. Was the system of superposing which you adopted that which is recognized as the most correct?

"A. There are other methods of producing the same results. The result, however, is the same in all these cases if the superposition is to be correct."

* * * * * * *

"60 Q. Which of the two forks, the North or the South, agrees more nearly in direction with Melish's stream in the vicinity of the 100th meridian?

"A. In location the Prairie Dog Town Fork lies between the two. In direction, as they cross the 100th meridian, the Prairie Dog Town Fork has a course less at variance with Melish's Red River than the North Fork."

One witness, A. J. Meers, in his cross-examination, when asked his opinion as to whether the North or South Fork of Red River was "the true Rio Roxo of Natchitoches, as understood by the Spaniards," answers as follows:

"Answer. As yet I have reached no definite conclusion, but I am very much inclined to think that the North Fork of Red River was known by the Spaniards as the Rio Roxo of Natchitoches.

"5th question. Upon what facts and circumstances do you base this conclusion?

"Answer. From observations I found appearances of a Spanish trail leading from Spanish Fort Bend, on the north side of North Fork of Red River, in the direction of Santa Fé, New Mexico, and that the route from the mouth of Elm leads through more palatable waters.

"6th question. Are there any other facts that lead you to this conclusion?

"Answer. There are none that throw so much doubt on my mind as this fact."

But this same witness, when examined in the month of March, 1894, after having seen "a topographical map of the Indian Territory, with parts of neighboring States and Territories, prepared by order of Maj. Gen. Schofield, and endorsed official, Hdqrs. Dept. of the Mo., Office Chief

Engineer, 1 Dec., 1869, filed as Exhibit A of this deposition, testifies as follows:

"8 Q. Please examine the map, 'Exhibit A,' and state whether or not you find thereon any trail which corresponds to the road you had reference to in your former testimony to which I have referred to. If so, describe your discovery in that regard from the map.

"A. I see a trail marked from this topographical survey running up on the north bank of the North Fork of the Red River, which is marked Marcey & McClellan, 1852, which corresponds with the identical same trail that I discovered and thought was a Spanish trail.

"9 Q. From what point to what point do you trace that identity?

"A. It runs from the direction of Spanish Fort Bend touching portions east of the North Fork of Red River, and taking right up that river in the direction of Santa Fé, New Mexico, and I have found such a trail in many places, corresponding with this topographical survey, which leads me to believe that it is not a Spanish trail, but simply Marcey & McClellan's trail of 1852.

"10 Q. If you had seen that map now in your hands prior to the month of September, 1891, when you gave the testimony I have referred to and stated you had not then reached any definite conclusion on the subject, what would have been your reply to Attorney-General Culberson's question at that time?

"A. My reply at that time would have been; I do not know. There would have been no doubt in my mind one way or the other. This trail was the cause of my being very much in doubt as to who made that trail. It was called made by the Spaniards, by the people. That is the very same trail that I have seen upon the ground. I have been over it many times. I could not begin to tell how many; perhaps a hundred times. I do not know how many, but I have seen that trail at many places and travelled it for miles.

"11 Q. You refer to the people calling it the Spanish trail. What people do you refer to?

"A. Residents in Greer county at that time. It was gen-

erally known as the Spanish trail by them from some cause; I do not know why. It was called that when I came there. It must have been about 1884 or 1885 that I heard it called that.

"12 Q. Do you know anything of the source of information of these people who were thus living in Greer county who called it by that name?

"A. No, sir; I do not know the source of their information. We were principally new settlers together.

"13 Q. How many settlers were there in Greer county when you first went there?

"A. I do not think there was over ten besides the cow-boys. There was a number of cow-boys."

One witness relied upon by the defence takes issue with the conclusions of the witnesses above quoted.

Capt. R. B. Marcy, who was examined as a witness before the boundary commission of 1886, but has since died, claims to have been himself the discoverer of the Ke-che-ah-que-hono in the year 1852; he doubts if that stream was ever known to civilized man prior to his exploration, but thinks it not improbable that if Melish had any vague conception of the existance of such a stream he may have intended the "Rio-san-saba" of his map to represent this South Fork of Red River, although he admits that stream to be about 500 miles distant from the locality of Red River.

Mr. Marcy says in this connection:

"It is very certain that the 'Prairie Dog Town River' was never delineated upon any of our maps, *or designated by any Spanish, French, or English name*, as were the most of the other streams in that country, and it was only known to the Indians, and possibly to some Mexican traders, as 'The Ke-che-ah-que-ho-no,' a *Comanche* appellation, the signification of which, the Delawares informed me, was 'Prairie Dog Town River.'" (P. 932, Record.)

Mr. Marcy argues further that—

"The Rio Rojo, or Roxo upon Melish's map, is almost entirely south and west of the Wichita Mountains, but in close proximity to them, which is in accord with my determination of the position of the North Fork, while there are no mountains upon the Prairie Dog Town Branch.

"The head of the Rio Roxo, upon Melish's map, is put down as in the latitude 37°, while upon my map the true latitude is 35½°, while the Prairie Dog Town River rises in about 34½°, so that if his Rio Roxo was intended to represent the Prairie Dog Town River it would be two and one-half degrees of latitude too far north." (P. 933, Record.)

The argument presented by Mr. Marcy, however, in support of his theory is based upon, or at least the result of, information in his possession between 30 and 40 years after the date of his own exploration, and so far as it seeks to supply reasons for any of Mr. Melish's work in the region in controversy it is refuted by the testimony of Mr. Melish himself. It must be borne in mind, too, in weighing the conclusions of Mr. Marcy, that, enfeebled by age, the year before his death, he was called upon to vindicate his own title as a discoverer; that instead of presenting him with a map of the treaty as a guide to any conclusion he might reach—and never having seen the map before—he was shown only a certified copy of a portion of that map said to have embraced "the part of the Red River country which the commission has under consideration at this time," but which is not made an exhibit with his deposition.

It is reasonably certain that Mr. Marcy, who had never seen the treaty map, was equally ignorant of the changes made by Mr. Melish in his map of 1823, for otherwise, doubtless, his mind would have been impressed with the idea that Mr. Melish was still groping in darkness when he

presented the Rio Roxo as such a different stream to his former representation of it, almost wiped out the unnamed tributary which lay to the west of the mountain range, and apparently sank the Wichita Mountains beneath the sandy bed of the river.

Mr. Marcy even admits, in his answer to the single interrogatory propounded by the United States commission, that he had no knowledge of Mr. Melish's source of information, and he shows in that reply that he has no conception what streams Mr. Melish was representing as the upper courses of the so-called Red River.

But there is another witness, Mr. Chas. Corner, who testifies under peculiar advantages as to the identity of Melish's Rio Roxo west of the confluence of the North and South Forks. None of the other witnesses on this point, except Maj. Clous and Mr. Meers, had ever been upon the treaty stream, and it does not appear that Maj. Clous was ever at the junction of the forks. The witnesses thus far quoted were experts in engineering, testifying from comparison and superposition of various maps; but Mr. Corner combines cumulative qualities in that he possesses both experience as an engineer and practical proofs procured by personal peregrination over both streams. This witness, when giving his testimony, in January, 1894, was expert civil engineer to the railroad commission of Texas. He was the last witness introduced in behalf of the defence. His testimony extended over five days. He was selected to accompany Mr. G. R. Freeman, one of the counsel for the State of Texas, in an exploring expedition to the Red River country under consideration. His authority was a letter from the Attorney-General informing him he would be under the general direction of Mr. Freeman. The purpose of this trip was stated to be "to enquire into the general correctness of that map (Melish's) as tested by natural objects and late maps issued

by authority of the United States." His attention was called to the objective points of comparison, such as the Great Bend of the Arkansas, Santa Fé, the Wichita and other mountains; and he was directed "to discover all facts which may tend to prove the accuracy or inaccuracy of said map." He entered upon the prosecution of his work under the belief that it was the general opinion, gathered from common rumor, that the United States was trying to take Greer county away from the State of Texas (see answer to 20th x-Q., p. 1376, Record). He describes his sources of information as follows:

"21 Ans. He handed me a copy of Pike's Expeditions, from which I have quoted. Afterwards I investigated this side of the subject fully for myself in other volumes: Bartlett's Personal Narrative; Marcy's Report; Gregg's Commerce of the Prairies; Kendall's Narrative of the Texas Santa Fé Expedition; Lt. Emory's Account of the Country; Yoakum's History; a very valuable collection of ancient maps, the property of Mr. DeCou, of this city; and the records of several railway companies.

"25 x-Q. Did you get or endeavor to obtain a copy of Melish's map of 1822 or '3?

"25 Ans. I did. My friend Mr. De Cou had one, which he had unfortunately disposed of at the time I asked him for it. I may say that this gentleman has the best collection of Texana of any individual or State institution with which I am familiar, more particularly in regard to maps, which extend from the time of Louis XIV to the present day, compiled from English, French, German, and Spanish sources. He has also many American maps. All of these I have carefully examined for the purpose of my investigations."

In the cross-examination of this witness from the point just quoted down to the 34th x-Q., an effort was made to ascertain what light, if any, this vast collection of hidden authorities would throw upon the subject of this contro-

versy, and it is, to say the least, remarkable that not a single authority in the vast collection enumerated is introduced as an exhibit to give to the court such light as they may have furnished to the witness. The witness, however, did, in the light of all his opportunities and investigations, prepare for the State of Texas, to be filed with his deposition, two maps, which are described by him in his answer to the 31st direct question as follows:

"31 Ans. I have prepared a map, of which the following is the title: 'Map of Portions of the States of Texas and Kansas, The Indian Territory, and that of Oklahoma, together with a superposition of the Outlines of Melish's Map of 1818, covering the same region. Compiled from Maps of the U. S. Land Office, a photograph of the Melish Map and observations of the country by C. Corner, Assoc. M. Inst. C. E., Dec., 1893, scale 12 miles to 1 inch. F. G. Blau, Draughtsman.'"

(The superposition is on tracing cloth and is marked Exhibit B. It is attached by blue silk ribbons to the beforementioned map, and the two sheets form one exhibit.)

"I have signed both of the sheets with my name, and I hand them to the counsel for the parties here present as a part of this my answer."

He goes on to state that he brought the Melish and the Land Office maps to the same scale and projection (12 miles to the inch), and as a result he finds that—

"Exhibit B, taking the sheets together, shows the absolute relative positions of the points in question *as they actually exist on the ground, and as they were mapped by Melish.*" (Answer to 34th direct question.)

That this witness fully appreciated the claim which Texas was asserting to the Melish meridian is seen from his argument following the words just quoted, for he proceeds and says:

"It is therefore impossible to establish the 100th meridian of Melish from any point in the southern portion of his map. On the other hand, that the 100th meridian of Melish should be located just west of the Great Bend of the Arkansas, is very clear. That the fact of its location there must be patent, and have been patent to anybody possessing Melish's map, cannot, I think, be gainsaid. I will illustrate my position and the importance which I attach to this landmark, as follows:

"A traveller, a trader, or a trapper going west from St. Louis would have to inform himself as to his location. He would want to know whether he had left his country or not. If he had a Melish map, however simple a man might be, he would be able to determine this fact with quite sufficient accuracy on his arrival at the Great Bend of the Arkansas.

"It appears to me to be in the nature of a sign-post in its relation to the 100th meridian of Melish."

And now particular atention is called to the fact that the tracing of part of the Melish map forming part of this Exhibit "B" consisted only of lines to represent the points of comparison made by the witness, and that there was not a mark, a letter, or a word by which to understand the conceptions of the witness as to the two prongs of Red River delineated from the Melish map, until light was thrown across the pages by the following testimony, drawn out in cross-examination:

"68 x-Q. Then I will ask you, for purposes of identification hereafter, to take your pen, with red ink, and mark on the tracing sheet of Exhibit B the following references for identification.

"(The State of Texas objects right here to any alterations of or additions to the Exhibit B as filed heretofore by the witness.)

"Mr. ALLAN continued:

"Mark the letter A at the point which you call the junc-

tion of Prairie Dog Town Fork and North Fork of Red River.

"The letter B on the main branches of Red River below the junction of the forks.

"The letter C on the stream 25 miles northward which in your last answer you said might represent Otter Creek.

"The letter D on the North Fork above the junction, and write the name of the stream which the other fork, in your judgment, represents.

"68 Ans. I have so marked the points as requested in red ink, with the addition of another letter D; in other words, I have marked the North Fork of Red River as D."

Surely this admission of the defendant's "expert civil engineer to the railroad commission of Texas" must, if we consider the case upon the theory that Melish was familiar with the physical features of the country, be absolutely conclusive that the treaty map laid down the stream, now known as the Main Red River, as the Rio Rojo de Natchitoches.

But quoting further from this adverse witness:

"71 x-Q. Does he give any name to this stream which you call the North Fork?

"71 Ans. I see no name on the map.

"72 x-Q. What name does he give to the South Prong, or the Prairie Dog Town Fork, as you have it marked?

"72 Ans. He marks his South Prong, or rather two of its sources, respectively, Rio Moro and Rio Rojo."

Thus the witness admits that these two streams forming the headwaters of the Red River are the sources of the South Fork and not the North Fork as contended for by the State of Texas.

Again, this witness identifies the South Fork in its relation to Santa Fé when he says:

"74 Ans. The sources of Melish's South Prong are

shown to head nearer Santa Fé than those of the North Prong. The distance to their headwaters as shown on Exhibit G is relatively about 160 and 240 miles.

"75 x-Q. Is there not a prong of the southern stream which is one of the sources of that stream much nearer to Santa Fé than what you have indicated?

"75 Ans. I find a tributary marked the Rio Moro to head about 51 miles east of Santa Fé as shown on Melish's map, marked Exhibit G."

It is true that counsel for the State, in the redirect examination of the witness, sought to break the force of this damaging and conclusive evidence, but the effort was a signal failure. It is almost amusing to witness the surrender of Mr. Freeman to our position that Mr. Melish was ignorant of the physical features of the country, as shown in rd. Q. 24–25. The entire work of the witness was a labored effort to identify the North Fork of Red River as the treaty stream by means of well-established landmarks. None stand out more boldly than the city of Santa Fé in relation thereto. A glance at the treaty map shows the Rio Rojo to rise between 37° and 38° north latitude, while the North Fork rises about 36° 30′. Melish himself says (page 42, line 5):

"The Red River rises in the mountains to the eastward of Santa Fé, between north latitudes 37° and 38°, and pursuing a general southeast course, makes several remarkable bends, as exhibited on the map; but it receives *no very considerable streams* until it forms a junction with the Wachitta and its great mass of waters, a few miles before it reaches the Mississippi." (P. 87, Record.)

The Washita is 154 miles east of the confluence of the forks. (Ev. Lieut. Beach, ans. to Q. 116.)

Mr. Corner admits, as quoted above, that the Rio Moro is only 51 miles from Santa Fé, while the head of the North

Fork is 240 miles, yet in answer to 6th rd. Q. he claims the head of the North Fork agrees more nearly with Melish's description than does the Rio Rojo. Melish referred to the *Rio Rojo*, for the stream representing North Fork is, according to the witness and the map, an unnamed stream.

All doubt, if there be any on that point, is dispelled by referring to the source Melish gives for his information as to that part of his map. He says (page 14, line 12):

"For the Spanish part Humboldt's very excellent map was selected as the basis, use being made of Pike's travels for filling up some of the details. The valuable charts of Vancouver furnished the materials for delineating the western coast and California, and some of the details, particularly about the bay of St. Francisco, were procured from the 'Voyages and Travels of G. H. Von Langsdorff,' lately published." (P. 87, Record.)

The Baron de Humboldt, on the face of this very map which Melish made his guide, says:

"It is believed in New Mexico that the river which rises to the northeast of Taos, and which receives the Rio Mora, is the same river which further east, in Louisiana, is known under the name of Riviere Rouge (Red River);" and further south he makes the remark: "Country unknown between the Rio Puerco and the sources of the Rio Colorado." (Lieut. Beach, ans. to Q. 63, p. 300, Record.)

On this evidence we insist that if Melish acted with knowledge of the country in preparing his map of 1818, then he laid down the North Fork as an unnamed tributary of Main Red River, which latter stream, according to Mr. Corner, certainly was laid down by him for some distance northwest of the confluence of the two.

Which is Red River?

Contending that the *true* 100th meridian must be adopted as the boundary, and claiming that as between the North and South Forks of Red River the true purpose and intention of the parties to the treaty cannot be determined from any evidence of what was known and understood when the treaty was entered into, then the maxim "that it is not allowable to interpret what has no need of interpretation" (Vattel's Law of Nat., p. 254) has no application to the case presented here. This is rather one of the class of cases contemplated by the same authority when he says:

"In unforeseen cases, that is to say, when the state of things happens to be such as the author of a deed has not foreseen and could not have thought of, we should rather be guided by his intention than by his words, and interpret the instrument as he himself would interpret it if he were on the spot, or conformably to what he would have done if he had foreseen the circumstances which are at present known" (*id.*, p. 262).

Can there be any doubt as to the meaning and intention of Mr. Melish to locate, according to his best judgment and knowledge, the continuing course of the *main* stream of that river, the location of which was well known at its eastern call under the treaty? We must bear in mind that its source, tributaries, and branches, *if any*, were unknown to him. Could he then have *intended* to delineate as the main stream a tributary or a branch farther to the west of that, which was a bold, clearly marked and well-known stream towards the east? The treaty did not call for the stream known *by the Indians* as Red River, but for that stream laid down in Melish's map as running "*westward* to the degree of longitude 100 west from London." As a fact, the North Fork from the junction, instead of running

westward, runs nearly north for a distance of more than 30 miles, bearing to the east rather than the west.

Let us take a glance at the map of Greer county, prepared by A. J. Meers, county surveyor under the government of the State of Texas, and see his testimony (Q. 10 to 14):

"10th question by same. Describe the general course of what is called the North Fork from its mouth to the meridian line.

"Answer. I believe I shall have to refer to a map I made (map shown). Commencing at the mouth of North Fork, the general direction of the river bears about six miles east of north for 33 miles. From this point to the mouth of Elm it runs west 2 miles, north for about six miles; thence north 18 miles, about 9 miles west; thence west about 7 miles; thence north about six miles, bearing one mile east, at which point its course runs in a westerly direction past the meridian line.

"11th question by same. Is there any particular break in the first line you have described as being north 33 miles by six miles to the eastward? If so, describe it.

"Answer. At sixteen miles from the mouth of North Fork of Red River, which point is about 2 miles east of the mouth of said river, the course of the river turns east about six miles; direction north from there six miles; thence east about two miles, the furthest point east of the river; thence north about one mile; thence west about four miles.

"12th question by same. How far is Vernon, Texas, from the confluence of the forks you have named and in what direction?

"Answer. I don't remember exactly; about thirteen miles south and two miles east.

"13th question by same. From your knowledge and experience as a surveyor, if you were directed to strike a line due north from Vernon to Red River, thence along that stream in a westerly direction until it reached the 100th meridian of longitude, and thence across said river, which of the two streams would you follow on reaching the forks?

"(Attorney-General Culberson, counsel for the State of Texas, objects to the question as being immaterial and only stating the opinion of the witness.)

"Answer. I would follow the South Fork of Red River.

"14th question by same. Give your reasons for so doing.

"(Same objection by counsel for State of Texas.)

"Answer. Because the course of the South Fork from that point would be the most westerly course."

Neither the treaty-makers nor the map-makers had any doubt about the stream running to the westward, the whole length of the boundary, rather than taking the abrupt north-eastern turn and course which is taken by the North Fork. And if we admit the knowledge on the part of both governments of the correctness of the criticism of Mr. De Onis on the uninformed and pliable Mr. Melish, and examine the diplomatic struggle between the representatives of the United States on the one hand, and Mr. De Onis, the Spanish Minister of State, upon the other, it must be conceded that the rival contentions were, upon the part of the United States, to run the line as far to the south and west as possible, and on the part of Spain to extend its dominion to the greatest possible degree towards the east and the north.

Applying the law of nations above quoted, and bringing in imagination the original treaty powers together at this date to settle the question whether the South Fork of Red River, running in a westward direction, according to the treaty call, or the North Fork, with its course returning towards the east—whether the stream or branch of the river towards the south or the one nearly fifty miles to the north of it should be regarded now as the boundary line which would have been fixed if the contracting parties had possessed the lights that are before us to to-day, can there be

any doubt but that the stream running westward would prevail, and especially if it appeared to them that the South Fork was the main stream?

In considering the question to-day the evident idea of the treaty-makers that the stream substantially ran from east to west would be supplemented by testimony establishing the following facts, which we will present in argument in the order named:

First. Melish's river at the 100th meridian coincides more nearly with the known location of the South Fork of Red River than with the North Fork at that point.

Second. All maps subsequent to the date of the treaty have recognized the Red River as conforming in course, direction, and location more to the position of the South Fork than of the North Fork.

Third. The Mexican grants under the Empressario contracts, together with all maps setting forth the boundaries of such grants, indicate that both the Government and its grantees recognized the South Fork of Red River as the boundary between the Mexican and the American territory.

Fourth. With full knowledge of these grants the authorities of Texas adopted the same conclusion as late as the year 1858.

Fifth. That the South Fork fills all the conditions of length, width, area of country drained, and annual supply of water which go to determine, as between two branches, which is the main stream.

Sixth. That the color of its water is darker than that of the North Fork.

FIRST.

Without repeating, we refer to the evidence of Maj. Livermore, Lieut. Beach, and Mr. Corner.

SECOND.

We have already referred to Long's map of 1820, Carey & Lea, 1822, Melish, 1823, and the map of A. J. Meers; and in further support of this contention we refer to all the maps filed as evidence in this cause, particularizing, however, Tanner's Travelling Map of Mexico, 1846; Map of Texas, etc., by J. H. Young, published by Mitchell, 1836; Emery's War Department Map, 1844; Marcy's Map of 1852; the exhibits filed with Mr. Pressler's deposition, and Stephen F. Austin's Map of 1837; Disturnell's Map of Mexico, 1846–'7, and Cordova's Map of Texas, 1848.

It is important, in considering this last-named map, to note the fact that its author and compiler, who is still living and following the occupation of civil and mechanical engineer, has testified in this case. Attention is directed to the whole of his testimony, from which it appears that he has followed his profession for over fifty years; that from 1845 to 1855 he was in the general land office of the State of Texas; that while chief draughtsman of that office he compiled the De Cordova map above referred to (Ex. 7); that he has superposed the De Cordova map of '49 with the Pressler map of 1867 and the Cram Atlas of 1887, and concludes from his investigation that the South Fork of the De Cordova map coincides with the South Fork or Pease River upon the maps of 1867 and 1887, and that it represents, in fact, the stream called sometimes Prairie Dog Town Fork (ans. to Q. 28). Mr. Pressler is still an employee of the Texas land office, and this witness (Creuzbaur) used the original Pressler map in this work, having found it in New York, and identified it as Mr. Pressler's work. It is a significant fact here that the words "Indian Territory" are printed in the Pressler map of 1867 across the territory known as Greer county. In his redirect testimony Mr.

Creuzbaur states that up to the time he left Texas in 1855 this De Cordova map was the recognized map of the State of Texas in the general land office, and Exhibit 9 with his deposition shows it to have been in use up to 1858. The witness also states in answer to 7th rd. Q.: "I never heard any claim made to the territory now called Greer county while I was an officer in the general land office of Texas." On the face of the De Cordova map the following description and verification appears:

"WASHINGTON CITY, *August* 12, 1848.

"We, the undersigned, Senators and Representatives from the State of Texas, do hereby certify that we have carefully examined J. De Cordova's map of the State of Texas, compiled by R. Creuzbaur from the records of the general land office of Texas, and have no hesitation in saying that no map could surpass this in accuracy and fidelity.

"It has delineated upon it every county in the State, its towns, rivers, and streams, and we cordially recommend it to every person who desires correct geographical information of our State. To persons desirous of visiting Texas it will be invaluable.

"THO. I. RUSK,
"SAM HOUSTON,
"DANIEL S. KAUFMAN,
"S. PILSBURY."

"The undersigned is much gratified in being *empowered* to certify to the correctness of this map, it being the only one extant that is truly correct.

"Austin, July 6, 1848.

"JOHN C. HAYS.

"I hereby certify that this map has been compiled, from the records of the general land office, by Robert Creuzbaur, and that it is the most correct representation of the State which I have seen or which has come within my knowledge. The meanders of the rivers are all correctly represented, being made from actual surveys.

"Austin, July 4, 1848.

"THOS. WM. WARD.

"The undersigned, commissioner of the general land office of the State of Texas, has no hesitancy in declaring it is his firm conviction that this map is a very correct representation of the State, representing all returns up to date, having been compiled with great care from the records of the general land office by the draughtsman Robert Creuzbaur.

"July 4th, 1848.

"GEO. W. SMYTH."

It has been sought by counsel for the State of Texas to prove that there never has been an official map of the State. It is hardly conceivable that any map could be made more binding upon the State in a controversy of this character than the one last referred to.

Following this map, we rely upon the Pressler map, Marcy's map, Pressler and Langerman's map, and all the maps published by authority of the General Land Office of the United States.

In relation to these maps of the General Land Office covering the region of the Indian Territory, the following testimony of A. F. Dinsmore, principal draughtsman of the U. S. General Land Office, with twenty-four years' experience in the office, proves an unbroken record, so far as that department of the Government is concerned, of its claim to the territory in dispute:

"5 Q. From the knowledge of which you are possessed, through the medium of your long service in the department, can you state whether there is any map on file in the department recognized in the General Land Office or Indian Department whereon the southern line of Indian Territory between the 98th and 100th meridians shows any boundary other than what is called the Main Red River, as distinguished from the North Fork of Red River, as the boundary between the United States and Texas?

"A. No, sir; I do not know of any map that shows a

different boundary line than the one shown on our latest map. I have looked through our old records pretty thoroughly and I do not find anything having the stamp of the United States General Land Office on it showing anything different."

Empressario Contracts.

Shortly after the date of the Spanish treaty of 1819 the project for the settlement of Texas was inaugurated. (See Sayle's Real Estate Laws, vol. I, art. 56, and Colonization Law of January 4th, 1823, art. 58.)

The first grantee under these laws was the father of Stephen F. Austin, but the latter became the beneficiary of the contracts by reason of the death of his father shortly after his arrival in Texas. It was Stephen F. Austin who gave the first intelligent description of this country to the world.

In a "Geographical and Historical View of Texas," by Hon. L. T. Pease, published in 1839, the following tribute to Austin as an explorer appears in vol. I, page 253:

"The unimportance of the early history of the country is strongly exhibited in the fact that it was really unknown as late as 1819, the date of the Don Onis treaty. Something more might have been expected from the associates of Magee, many of whom returned to the United States, who had passed through the heart of the country, and among them were some who may fairly be presumed to have been capable both of estimating and giving a just account of its value and importance. Had such an account been given, even verbally, an impression must have been made which is scarcely reconcilable with the want of intelligence on the subject evinced by the treaty. It is very certain that these daring men, greatly intent upon other objects, did not properly appreciate the country they passed through.

"Texas may, therefore, be considered as unknown, except to the Spanish authorities in Mexico, who carefully concealed their knowledge from the world, until Stephen F. Austin and his colonists gave a true account of it; and this was at first deemed too incredible for belief. It is true, the existence of such a town as San Antonio, the river of that name, as well as the more important rivers, Brazos and Colorado, had been known for more than a century; and this rendered the tale of Austin and others more incredible. It was strange, indeed, that nobody should have dreamed all this while that the finest country in the world, and so easily accessible, remained unoccupied, and almost unclaimed, while almost every nook and corner of the earth had been eagerly explored in pursuit of a like object." (Vol. I, p. 253; p. 146, Record; see also same author, p. 165, Record.)

Under these colonization laws a grant was made to one "citizen Arturo G. Wavell" for a tract of land described as follows:

"The line shall begin at the point of junction of the creek called Satchá, or Sulphur Fork, with the Red River of Nachitoches, following the bank of the former to its head; thence a straight line shall run parallelly with the said Red River to the place where the Kiamish River empties into said Red River; thence the said line shall run down the margin of said river to intersect the place of beginning." (Art. 90, Sayle's Real Estate Law, vol. 1.)

Subsequently a similar grant was made to one Jno. Cameron within the following boundaries:

"It shall begin at the western terminal point of the colony of General Arturo G. Wavell, on the Red River of Nachitoches; thence it shall ascend the course of said river with the dividing line between this republic and that of the United States of the North to the point of intersection of the 102d degree of longitude west of London; thence a straight line shall run down with the same degree south to

a distance of twenty leagues; thence it shall run to the east on a parallel line with the Red River of Nachitoches, forming a zone of precisely twenty leagues, to intersect the western limit of General Wavell's colony, terminating at the place of beginning." (*Id.*, art. 74.)

Another grant was made to Juan Antonio Padilla and Thos. J. Chambers with the following boundaries:

"The indicated survey shall commence at the point on which the twenty border leagues of this republic terminate, from the dividing line running along the 23d degree of longitude west of Washington, at the point where it crosses the Rio Rojo de Natchitoches; a line shall run up parallel with said dividing line, on a northern course, in the direction of the Arkansas River and terminate twenty leagues before reaching this river. From this point the line shall deflect on a western course parallel with the Arkansas River, to intersect the twenty-fifth degree of longitude west of Washington; thence the line shall follow the said degree on a southern course to intersect the left margin of the Rio Rojo de Natchitoches; thence the line shall run eastward with the margin of said river to the place of beginning." (*Id.*, art. 89.) (See pp. 146–148, Record.)

"As will be seen from the record, the above evidence was found in the general land office of the State of Texas, among its Spanish manuscripts. The contracts referred to were translated into English by General X. B. Debray, Spanish translator to the government of Texas.

It thus appears that the northwestern corner of the Cameron grant was the intersection of the 102° of longitude with the Red River, which was described as "the dividing line between this republic and that of the United States of the North." This line was then to run south twenty leagues, "thence to the east on a parallel line with the Red River of Natchitoches."

A glance at any map published up to the date of the

treaty would convince the examiner that such a description of boundary could not have been based upon the course of the Red River as laid down in the treaty map. It seems more than probable that Melish's map of 1823 may have had some influence, coupled with the personal inspection of the country and the information imparted by Austin and his colonists.

But, whatever sources of information were possessed by the contracting parties, an examination of any and every map we have been able to discover, showing the localities of these various Empressario grants, must, we think, be convincing that the contracting parties upon both sides regarded the stream called Ke-che-ah-que-hono, or Main Red River, as the boundary line dividing the two countries.

The following maps upon that line of argument have been filed, and are here referred to:

1. Stephen F. Austin's map, 1837 (p. 293, Record).
2. Map attached to D. B. Edward's history, 1836 (map "4," p. 185, Record).
3. Mitchell's map of 1836 (p. 292, Record).
4. Col. Ed. Stiff's map of 1840, by Conclin (p. 170, Record).
5. De Cordova map of 1848, Ex. "C" (p. 292, Record).
6. Smith's map of 1849 (p. 184, Record).
7. Pressler's Ex. 9 and 10 (p. 293, Record).
8. W. F. Cummins' Ex. "B" (p. 984, Record).

The archives belonging to the different land offices existing under the laws of Coahuila and Texas became archives of the general land office of Texas. (4 Civ. Stat., p. 169, and 10th gen. provision Cons. of Republic.)

Wavell's contract of March 19, 1826, and Cameron's contract of September 19, 1828, were each made under the colonization law of 1823, which placed no limitation against settling within border or littoral leagues. (Vol. I, Sayle's Real Estate Laws of Texas, art. 67.)

"The commissioner appointed a surveyor to run off the lands, and colonists were obliged to set fixed and permanent landmarks on their boundaries within one year. * * * In the absence of proof to the contrary the presumption exists that a survey was made." (*Id.*, art. 104; Boon *v.* Hunter, 62 Tex. 582.)

Article 107 of the same volume sets forth the rigid rules requiring records of all these contracts, reports, and surveys to be turned over to the commissioner of the land office of Texas.

The value of these maps of colonial grants as evidence is augmented in the light of the laws just quoted, and the failure of the defence to produce a single record bearing upon the subject speaks volumes.

That the boundary line above delineated was not the North Fork of Red River is made absolutely clear by the declaration of the author of the Pease History and map as to the relation, in point of location, between Red River and the Brazos. That historian says:

"The Brazos, which falls into the Gulf nearly midway of the coast of the middle region of Texas, has a course little short of a thousand miles in all its windings. Its headwaters are not far distant from those of the Red River, and its course for more than a hundred miles is nearly parallel with that river, when it takes a southeasterly direction and holds this general course to its mouth." (Pp. 145–6, Record.)

This historian of Texas is not only borne out in his correlation of these two streams as now ascertained and determined by actual observation and survey as exhibited on modern maps, but the principal expert witness for Texas upon the subject of streams (Mr. Chas. Corner), corroborates the statement of the historian just quoted, as follows:

"59 x-Q. Does the Brazos run comparatively parallel with any stream to the north for any distance in an eastern or southeastern direction; if so, what is the stream and for what distance do they run in a similar direction?

"59 Ans. All the streams heading in the Llano Estacado have a general southeasterly course from a point nearly as far north and west as the Prairie Dog Town Fork of Red River. The Brazos retains this course for about 150 miles, thence easterly and northeasterly to near Seymour. It then returns to its southeasterly course and maintains it to the Gulf."

The Pressler Map of 1858.

It will be borne in mind that in 1852 Capt. R. B. Marcey first published "Ke-che-ah-que-hono" as the name for the stream which on the De Cordova map of 1848 was called South Fork. It is not assuming anything unreasonable to insist that the most reliable data and authority in regard to the stream which divided the Cameron grant from the Indian Territory were in the possession of the authorities of the general land office of Texas, where we found the Spanish records of the colonial grants. The De Cordova map, as we have shown, was the recognized map of Texas (if not official) until the Pressler map was published in 1858. That map is marked Ex. R. C. No. 6 and No. 9 with the deposition of Robert Creuzbaur.

Mr. Pressler, as shown by his own testimony, has been in the Texas land office for about forty eight years. In his evidence (Q. 7) he says that his maps were "compiled from the records of the land office and other sources."

The upper left-hand corner of the Pressler map of 1858 has a sketch of the Empressario contract grants, coinciding practically with the maps of those grants already alluded to with this exception: that the stream which skirts the Jno. Cameron grant upon the north, while having the same gen-

eral direction and location as upon the other maps, names the stream *Prairie Dog Town Fork of Red River.*

The Cameron grant is not named, but the Padillo and Chambers grant is, and it rests on the north side of Prairie Dog Town River opposite the northwestern corner of the Cameron grant at 102° north latitnde.

This map was compiled from the records in that office. It was published before any Greer county was known as such; before the boundary commission of 1859, having agreed upon the meridian line, disagreed as to which stream should be the intersecting point; it was more than a quarter of a century before the territory now called Greer county had a white settler within its borders; it was much nearer to the date of the treaty than to the date of this trial; the "other sources" from which Mr. Pressler could obtain his information were the living witnesses, the earliest pioneers, the military commanders, the hunters and rangers, the first surveyors, the leading men of light and learning. And it was with all these advantages and lights that Mr. Pressler ascertained from "the records of the General Land Office and other sources" that the line dividing Mexico from the United States of the North was the stream they had just learned to called Prairie Dog Town River.

It is sought through this witness to assail the testimony of Robert Creuzbaur, and while the witness does not agree that the Salt Fork on De Cordova's map is coincident with Prairie Dog Town Fork, still he does concede that Prairie Dog Town Fork *is* laid down on that map by the name of South Fork. Hear him:

"A. I think what he calls the Salt Fork upon his map agrees with the Salt Fork upon the present map, and what he calls the Pease River agrees with Prairie Dog Town River upon the later map.

"Q. 21. Upon what do you base this opinion?

"A. Creuzbaur represents on his map three forks; one is called Dog Fork, the second Salt Fork, and the third one South Fork. He says Dog Fork agrees with North Fork, and then he skips the Salt Fork entirely and compares the Salt Fork with Prairie Dog Town River, and the South Fork he calls Pease River. Now, it could not be Pease River, because Pease River is a fork that runs into Red River below the mouth of North Fork.

"Q. 22. What river on Creuzbaur's map more nearly corresponds with the South Fork as at present known?

"A. The South Fork on Creuzbaur's map agrees with the Prairie Dog Town Fork."

But the testimony of this witness goes much farther than to establish an identity of the South Fork or Main Red River upon the De Cordova map. He corroborates all the other testimony as to Melish's map of 1823, agreeing with the South Fork rather than the North Fork of Red River.

"x-Q. 34. Please examine Melish's map of 1823 again, and state whether the general direction of his Rio Rogo or Red River west of the 100th meridian agrees more nearly with the North or the South Fork of Red River.

"A. Well, upon this map it agrees more with the Prairie Dog Town Fork."

(See also x-Q. 128–'30.)

And then this witness, who has had better opportunities of familiarizing himself with the maps of Texas and surrounding country, by reason of his long service to the State, admits that since Melish's map of 1818 the maps he has seen make the Red River conform rather to the Prairie Dog Town River than to the North Fork.

"x-Q. 35. Do you know of any map since the date of Melish's map of 1823 in which the general direction of the main stream of Red River is not more nearly in accord with the Prairie Dog Town Fork than the North Fork?

"A. Well, the late maps of Texas I have seen generally present a stream running nearly due east and west.

"x-Q. 36. And does that conform rather to the Prairie Dog than to the North Fork?

"A. Yes, sir."

Mr. Pressler's own map of 1858 can be best interpreted by himself, as was the Cordova map by Mr. Creuzbaur, its compiler. Mr. Pressler, after having said in answer to the 88th x-Q. that "the Creuzbaur (De Cordova) map was in use to 1858, when my map was made," testifies as follows:

"89 x-Q. Please examine your map of 1858 and tell me if it does not designate what is now known as the South Fork of Red River as Red River west of its conjunction with the North Fork.

"A. Yes, sir; the name appears there.

"90 x-Q. And those words are on the north side of the South Fork, are they not?

"A. Yes, sir.

"91 x-Q. In your map of 1858, into what stream does Salt Fork enter?

"A. Into the North Fork.

"92 x-Q. Where should it enter?

"A. Into the Prairie Dog Town Fork."

Mr. Pressler further supports the position that the Stephen F. Austin map of 1837 bears out the complainant's contention as to the recognized boundary being the South Fork.

"97 x-Q. Have you not with you the Stephen F. Austin map compiled in 1837 by himself?

"A. Yes, sir.

"98 x-Q. Please examine that map and tell me, if you can, what stream the Cameron grant skirts as its northern boundary up to a point between the 101st and 102d meridian?

"A. It is marked Red River.

"99 x-Q. Does the general direction of that stream in

this map of 1837 conform to the direction of the Prairie Dog Town Fork or of the North Fork?

"A. It agrees better in direction with the Prairie Dog Town Fork."

Attention is here called to the testimony of Mr. Creuzbaur that the Dog Fork on Cordova's map represented the North Fork. This is corroborated by Mr. Pressler as follows:

"117 x-Q. Now, examine on that map, the 100th meridian line and the territory lying east of it bounded by Dog Fork, and state what stream the Dog Fork more nearly resembles as known on modern maps.

"A. Dog Fork resembles the North Fork.

"118 x-Q. Does not the territory line south and east of the Dog Fork nearly resemble the territory now known as Greer county, in shape?

"A. Yes, sir.

"119 x-Q. What is that territory marked upon the Creuzbaur map north of the stream marked Red River and including the territory lying between Dog Fork and Salt Fork?

"A. Indian Territory."

The evidence of this witness is further of considerable importance in establishing our contention that no map, as far as known, was ever published which did not show the Cameron grant as skirting Prairie Dog Town Fork, and thus recognizing that stream as the boundary by the government of Mexico, under whom Texas alone can claim. Mr. Pressler says:

"173 x-Q. Please examine your map of 1858 and tell me which stream west of the 100th meridian represents the Prairie Dog Fork of Red River.

"A. The stream called Ke-che-ah-que-hono, or Prairie Dog Town River.

"174 x Q. In your map of 1858, what stream is made the southern boundary of the Padilla and Chambers colony?

"A. The Prairie Dog Town River.

"175 x-Q. What stream is made the northern boundary of the Cameron colony?

"A. It is not laid down on the map.

"176 x-Q. Now, examine the same map for the Wavell colony, which was the eastern boundary of the Cameron grant, and tell me what stream would be the northeastern corner of that colony upon that map to form the intersection with the Padilla and Chambers colony, as called for in the grant.

"A. Well, the northwest corner of Wavell's corner, or the beginning corner of Cameron's second contract, is on L. Pine Creek.

"177 x-Q. I want to know where the Cameron colony would go from the Wavell colony in order to form its northwestern corner at the southwestern corner of the Padilla and Chamber grants as called for in the original contract.

"A. It would follow Red River and run west to the 102d degree of longitude; its south line would run parallel with the river, or twenty leagues from it.

"178 x-Q. Would it not strike the Padilla and Chambers grant on the Prairie Dog Town River?

"A. Yes, sir; it would join it at that point.

"179 x-Q. Do you know of any map in the land office now or at any former time where the Padilla and Chambers grant appears upon the North Fork of Red River as its southern boundary?

"A. No, sir.

"180 x-Q. Do you know of any map of the old colonies, existing now or at former times, where the John Cameron colony is laid down as having its northwestern corner on the North Fork of Red River?

"A. No, sir."

FIFTH.

THE SOUTH FORK FILLS THE CONDITIONS TO MAKE IT THE MAIN STREAM.

It runs further westward, and is the longer of the two forks.

Maj. J. W. CLOUS, an engineer officer, in two expeditions, from 1868 to 1872, whose duties consisted "in taking astronomical observations, measurements by odometer, and the courses by prismatic compass, and afterwards delineating them upon the map" (x-Q. 24), found the western extremity of the Prairie Dog Fork 15 to 20 miles west of the 103d meridian, and the length of the stream "about 275 miles to the confluence of the two rivers."

CHAS. GOODNIGHT, the owner of 60,000 acres of land, residing in the Red River country since 1847, in the cattle business along the Red River since 1856, with Ross' Rangers in 1861–'2, testifies South Fork was regarded as main Red River; the other stream was called North Fork by the rangers, and was called something like "Mobetie" by the Indians; that the town of that name in Wheeler county was supposed to be named after the Indian name of the North Fork; that the Mexican name for North Fork was "Nueces" (meaning nuts, walnuts or pecans). (Ans. to QQ. 1–14).

He says in answer to the 15th question, speaking of the South Fork, "it was always regarded the longest and biggest river, with the biggest watershed, and was much broader."

"It drains over about three times the country." (Ans. 27th Q.)

"Water first appears at the headwaters of the North Fork in Gray county." (Ans. 36th Q.)

The South Fork heads west of Amarillo about 75 miles. (Ans. 37th Q.)

Then the witness thus describes from personal knowledge the condition of the South Fork or main stream in regard to its usual flow of water.

"19 Q. What did they call it from the Palo Duro canyon up?

"A. Riffling Water or Falls it would be termed in our language—the main river up through the canyon.

"20 Q. What is the general condition of the river from the canyon in regard to its flow of water throughout the year?

"A. All the upper end of the canyon runs throughout the year; that is, I speak of the main fork down for a number of miles from the main fall in the river.

"21 Q. About how far down does it cease to run and from what cause?

"A. Runs about 25 miles because it is rocks there and no sand at all—not sand enough to prevent the water running. The grade of the river caused the sand to wash away; the grade there averages 16 or 20 to the mile. After the 25 miles running water it widens out and strikes a big sand bed which absorbs the water in dry seasons.

"22 Q. What is the condition and characteristic of this stream in seasons of high water?

"A. A great body of water.

"23 Q. What is the color of its water?

"A. Very red; coming from the paint-clay above. There is dirt in there that would make a good paint. That is where the Indians get their paint from—that common red paint that they use—vermillion.

"24 Q. How does the color of its water compare with the color in North Fork?

"A. Much more colored; much more red.

"25 Q. What is the general characteristics of North Fork in regard to its flow of water?

"A. Why, there is very little water from what you call Elm Fork up in dry weather; below that it generally flows

a little water. I think it is hardly ever entirely dry, though it may be in a few places; that is, from Elm Fork up.

"26 Q. How does its flow of water compare in quantity with the flow of water you have referred to as running for 25 miles from the canyon of the South Fork?

"A. I don't think it is much different.

"27 Q. Taking the annual flow of water that passes down each stream into the river below the confluence of the forks, which will discharge the greater amount of water during the year into the river below?

"A. South Fork about double—fully that; it drains over about three times the country."

A. J. MEERS, the surveyor of Greer county, thus describes the two streams:

"Answer. I think the banks of the South Fork would average eight times the width of the North Fork. The flow of water in sight is nearly the same, counting the North Fork below the mouth of Elm at low water.

"17th question by same. How does the North Fork above the mouth of Elm compare with the South Fork in flow of water?

"Answer. Above the mouth of Elm the North Fork is comparatively dry every season of the year, except at high water.

"18th question by same. Outside of the channel of water in sight on the South Fork, what relation do the sands between the channel and the banks bear to the water received by the South Fork on either side?

"Answer. The sands from the channel to the banks of South Fork seem to be about as wet as the sands from the mouth of Elm to the mouth of North Fork, while above the mouth of Elm the sands seem to be dryer, except in high water.

"20th question by same. How do the North and South Forks compare in the quantity of water they receive from their various tributaries and the area of country they respectively drain?

"Answer. I have never been to the head of North Fork,

but, judging from the amount of water coming down, there is much more water drained by the South Fork. The area of country drained by the South Fork is much greater than that drained by the North Fork.

"21st question by same. What is the average width of the South Fork in Greer county?

"Answer. Something over half a mile from bank to bank."

And then in cross-examination this witness further compares the two streams:

"23d cross-question. Is not the water of North Fork, on an average through the year, deeper than that of South Fork?

"Answer. Its banks being narrow, it is, perhaps, washed out in places in deep holes, but the main channel is not much different. The water of the channel of North Fork below the mouth of Elm has probably the advantage of the waters of South Fork in quantity. I mean the water in sight.

"24th cross-question. Is not North Fork below the mouth of Elm a live, running stream all the year?

"Answer. It is not in sight.

"25th cross-question. Is not the channel of the water in sight in the North Fork, on an average through the year, wider than the channel of water in sight—South Fork?

"Answer. I hardly think so."

Mr. Corner admits that "the area of the watershed of the South Fork is more than three times greater than that of the North Fork" (Ans. x-Q. 56).

J. R. Crouch, who moved into Greer county in 1884, when only one other family lived there, describes the South Fork as four times the widest (12th Q.); "both streams quit running in dry times" (16th Q.); average width of North Fork above Elm about 200 feet (20th Q.).

J. W. WILSON has been familiar with the country since 1854; from that time up to 1860 as a ranger fighting the Indians; says South Fork of Red River was supposed to be the boundary, and the officers stopped pursuit of Indians, unless they had been stealing, when they crossed into Greer county (QQ. 6–10), and he thus describes the two streams:

"12th question by same. Can you describe the differences between the North and South Forks in respect to width, flow of water, color of the waters, and character of the same?

"Answer. The South Fork of Red River is something about a mile wide in what is known as the bed of the river, and the North Fork of Red River is not over three hundred yards wide below the mouth of Elm. Above the mouth of Elm it is very narrow, in many places not over fifty yards wide. Generally in the summer season there is more water in sight in North Fork below the mouth of Elm than there is in South Fork below the Palo Duro canyon. Above the mouth of Elm there was not running water, except in holes or after a big rain. The Palo Duro canyon is one of the headwaters of the South Fork and there is running water in it all the time, because it has a rock bottom. In a low time of water there is not much difference in the color of the water, but in high water the South Fork is darker, because, I think, it drains a larger scope of country and runs through redder lands. There is not much difference in the character of the water in the South Fork and that in the North Fork below the mouth of Elm. They are both bad, salty, and gyppy. Above the mouth of Elm the water of North Fork is not so bad, as there are springs and little tributaries of fresh water running into it, which caused, I suppose, these holes spoken of, the same as are in the South Fork.

"13th question by same. In such seasons as you have referred to, when there is more water in sight below the mouth of Elm, what is the condition in regard to water in the bed of the South Fork?

"Answer. The water in South Fork stood in holes like

it did in North Fork, but the holes were larger because there was more water there."

J. H. RICHARDSON was a buffalo hunter in the region from 1872; buffalo ranged through Greer county up to 1879; thousands of Indians located there up to 1882; killed over fifty buffalo in Greer, but driven off by U. S. soldiers before getting their hides; describes the two streams as follows:

"11th question by same. What are the differences between the North and South Forks of Red River as to width of stream, flow, and color of water?

"Answer. The main Red River, as we always called it, now known as South Fork, from the Forks up to Palo Duro canyon measured 1,700, 1,750, and 1,775 steps; me and my boys stepped it in a number of places. Above the mouth of the Palo Duro canyon the width decreases from about two hundred yards until it gets to be about twenty.

"12th question by same. Why did you not step it off there?

"Answer. Because I had no occasion to.

"13th question by same. Go on now and finish answering the former question.

"Answer. I never stepped North Fork, but I think it would average from 150 to 200 yards wide until it gets up to about the foot of the plains. Up to about five years ago the South Fork ran more water than the North Fork, but in the last five years I think the North Fork has run the most water, and above the mouth of Elm Fork you could travel miles without finding enough water to water your horse. In travelling up the South Fork I have found it very dry, and when we found any water it was so bad we could not use it. When the water is high I think the color of the water in the South Fork is deeper than in the North Fork, because the South Fork drains a larger scope of country and runs through a different character of soil.

"14th question by same. Is there any part of the South Fork where the water is continually running?

"Answer. After you get about from ten, fifteen, or twenty miles above the mouth of the Palo Duro canyon the water was always running whenever I saw it."

J. S. ELLISTON, a cow-boy, has known the country since 1871; says South Fork is the widest; bed of the South Fork quicky or soft and boggy; that in moderately dry seasons, when there was no water on surface of South Fork, he watered his stock by letting them stand on the bed of the river, when "the water would sometimes rise and run for one hundred or one hundred and fifty yards and then would sink into the sand."

E. R. FLETCHER, a justice of the peace in Greer county, when testifying for the State, says he has been on Palo Duro canyon both summer and winter and the stream was running each time; that he has fished in half a dozen tributaries of the South Fork; that they are all continual running streams, containing fish weighing up to nine pounds each (x-QQ. 14–20); has crossed South Fork when dry, on surface, and wagon wheels would suck up water.

J. G. BOGARD, attorney, and for eighteen months county surveyor, says South Fork is five or six times as large as North Fork; no particular channel in either a good portion of the time, except "below the mouth of Elm, in North Fork the water runs longer and stands in holes, some of them tolerably deep" (Q. 12).

E. R. CLAUNCH knew the country since 1879; it was a wilderness up to 1884, when the first actual settlers came in.

CHAS. E. ANDERSON, secretary of Day Land and Cattle Company, says company were anxious for Texas to gain the territory; leased 203,000 acres in Greer from Texas in 1885; the company procured evidence for Texas boundary commissioners; sent a member of the company to New York to interview Gen. Marcy before he testified; thinks the company paid Marcy's expenses. This witness gives

the same general testimony as to the condition of the water in the two streams, both being dry at times.

Frank M. Maddox testifies the South Fork is the longest stream and drains the larger area of territory than the North Fork (QQ. 8–10); says when South Fork has been dry for some time, water can be reached by digging from one to three feet below the surface (Q. 13).

W. M. Lawson proves South Fork three or four times wider than North Prong; hunts a good deal; has travelled up North Fork at least two miles due east of Altus before finding water for his horses; never crossed South Fork without seeing water in it, but has seen it when not running (QQ. 5–6); bridge ¾ of a mile long on South Fork washed away in 1891; stream then mile and a half wide; never knew any bridge to be across North Fork.

C. F. Doan, deputy assessor of Willbarger, Texas, summoned but not examined by the State of Texas, has known both streams since 1878, living on the banks since that time; says South Prong over a mile between banks, North Prong 300 or 400 yards wide; judges more water comes down South Prong the year around (Q. 12); from a point two miles above junction of the forks North Fork is often dry (Q. 14); in very dry season both rivers dry; helped take out wagon logged in South Fork, and had to build a cofferdam on account of the water rising (Q. 17); North Fork looks like a canal beside South Fork; in December, '93, North Fork was dry, except where Otter Creek runs into it, down to the springs two miles from its mouth (Q. 36); near six months of the year it is not running (Q. 38); South Fork runs more water, as shown by observations during three years (Q. 39); Elm Fork never dry (Q. 40); on June 6, 1891, during freshet, South Fork over eight miles wide.

B. K. Wood, merchant, Vernon, practising physician in

1882, acquainted with country, and knows South Fork as far as Palo Dura (Q. 5); length and width decidedly in favor of South Fork (QQ. 11–12); South Fork "would discharge the most water, the same conditions existing as to rainfall at their heads" (Q. 16).

W. E. Timmons describes the two streams in crossing within 48 hours when carrying counsel to take depositions in this case; North Fork not over fifteen feet wide north of Mangum Road (Q. 4); no water in it at all; crossing South Fork, water came near bed of the buggy; stream 75 to 100 yards wide (QQ. 9–12); crossed North Fork below Elm two days later; stream five feet wide; duck egg in centre of stream not covered by water (Q. 15); has crossed South Fork often; never remembers it without water (x-Q. 8).

Dave McBride lives near New Mexico line; known both streams 23 years; says South Fork widest, drains the largest area, and more water flows in South Fork than North Fork at high-water times (QQ. 7–8); "it never dries down any depth below the surface" (Q. 10); was with the U. S. surveying party in Greer county in 1874–'5; has caught fish weighing 30 to 40 pounds in South Fork (Q. 24); has travelled North Fork for several miles without seeing any water (Q. 28).

Pat. Dooling, known country since 1870 from El Paso to Witchita county, came from Mexico, has been pilot for surveyors, says: "Red River heads plum the other side in New Mexico" (Q. 7); North Fork heads about the west line of Wheeler county (Q. 13); as a general thing South Fork runs all the time through the canyon; in some places, standing only in holes, and this condition extends 30 or 40 miles (QQ. 14–17); it runs into the bed of Red River, "a big wide body of sand," and in times of high water "a very dangerous and full stream from $\frac{3}{4}$ to 1 mile wide" (QQ. 18–

21). Witness took out of the canyon all the piles for railroad bridge near Newlin (Q. 22); this bridge been washed away twice (Q. 27); a gread deal more water comes down South Fork than North Fork, but more show of water in holes in North Fork; South Fork drains a great deal more country; after you strike Palo Dura canyon there is more water than in the North Fork, because it is living water (QQ. 29–32).

I. L. Barnett lives near Amorilla; in cattle business since 1876; South Fork flows about five times as much water as North Fork (Q. 10); lived in Greer county five years.

J. R. Jowell lives at Goodnight; lived on Red River since 1855; first in Young county at Fort Belknap; knowledge extended from mouth of Pease up to Palo Duro; was connected with scouting expeditions in frontier troops; finally mustered into Confederate service; South Fork regarded as boundary, and troops never crossed the boundary; it was understood to be Red River (QQ. 10–12 and 17). (See also cross-examination, QQ. 4–9.)

A. L. Yeckley lived in Greer since '85; in that region since 1880; summoned as witness for Texas, but not examined; seen North Fork every few days for over four years; lived in sight of South Fork, and saw it every day about six months (Q. 4); South Fork carries more water annually; gives following comparison:

"8 Q. How does the North Fork above the mouth of Elm compare with the Salt Fork in its general condition throughout the year?

"A. It does not compare with it at all; it is dry nearly all the time. I never saw but one summer that there was any water in it at all hardly; that was the summer of 1885. Every summer since it has been dry above the mouth of Elm."

During the wet year 1885 South Fork ran three or four times as much as North Fork.

J. T. JAMES, justice of the peace of Greer county, who took depositions in behalf of Texas, a physician by profession, lives a mile and a half from North Fork and ten miles from South Fork, testifies from personal observation, as follows:

"7 Q. Have you had an opportunity to notice the annual flow of water down the North and South Forks, respectively, during the period you have lived there? If so, state the conclusions you have formed in that regard.

"A. I have, and my conclusions are that there is a material difference in the size of the streams and the annual flow of water. From the appearance of the river beds and sand hills, the South Fork conveys three or four times the amount of water annually that the North Folk does. I have seen for two years the North Fork dry most of the time, except occasionally a hole of water standing. I haven't seen South Fork dry at any time, though it may have been dry during that time.

"8 Q. In speaking of the condition of the North Fork during the two years referred to, have you reference to that river above or below the mouth of Elm?

"A. Below the mouth of the Elm, and I have seen it once above the mouth of the Elm.

"9 Q. What is the condition of North Fork at present near the junction of the two forks?

"A. As late as Sunday last, the water was not running all the way. There is a portion of the river that the bed of it is destitute of water.

"10 Q. How far from the confluence?

"A. Six or seven miles."

WM. A. HUNTER lived five years two miles from North Fork, five miles from South Fork, testifies:

"3 Q. How often have you seen the two streams during your residence there?

"A. Many a time; see them frequently.

"4 Q. What is the occasion of your seeing the South Fork frequently?

"A. I cross South Fork when I go to market, and I see South Fork when I go to the post-office to get my mail.

"5 Q. How do the two streams compare, according to your observations, as to the relative quantity or water which they annually convey into the river below the forks?

"A. My opinion is the South Fork carries the most water.

"6 Q. What is the general condition of the North Fork in comparatively dry seasons?

"A. The water stands in holes in the dry season."

SAMUEL G. BANKS has lived in Greer eight years; ran the straw road or bridge across South Fork at Doan's; it threw the water to the south side and caused caving of banks in Willbarger county; straw bridge fifteen feet high; lives a mile and a half from North Fork, in sight of the river; testifies as follows:

"A. To my opinion South Fork carries three times the amount of water to North Fork.

"11 Q. Since the North Fork was in sight of your house, describe its general condition in regard to flow of water throughout the year.

"A. North Fork for the last eight years has been on a little rise a good many times, and twice has been very full and out of its banks.

"12 Q. During what portion of the year?

"A. In the spring.

"13 Q. What is its general condition at other seasons of the year?

"A. At moderate seasons it runs and in dry seasons it gets dry, except in holes.

"14 Q. How far is that from the mouth or junction of the forks?

"A. I have seen it from the mouth clear on up to Otter Creek when it was dry only in holes."

And in reply to question 15 says water can be found at two feet deep when surface is dry.

GEO. R. GROOMS lived in Greer county seven years, one hundred steps from North Fork; says from his observation South Fork empties as much again water throughout the year into the river below the forks as North Fork does (Q. 12).

WM. COCKRELL has lived seven years in Greer county, half mile from North Fork; often sees both streams every day in the week; says South Fork carries the most water (Q. 8); North Fork in dry seasons quits running, except the holes (Q. 10).

J. T. TIERCE went to Greer county in 1880; running cattle; knows both forks from the confluence to their respective heads and details his knowledge as follows:

"5 Q. Describe the South Fork in regard to the flow of water at and near Palo Dura canyon?

"A. From the mouth of Palo Dura down there isn't any flow only during freshets or rains.

"6 Q. Describe it above the mouth of Palo Dura canyon?

"A. It is a nice running stream from the mouth up about thirty miles until you strike the Draw.

"7 Q. How does that stream compare with any part of the North Fork that you have ever seen?

"A. It furnishes a great deal more water the year round than any portion of North Fork.

"8 Q. What is the general condition of the North Fork from its head down to the mouth of Elm?

"A. Goes dry anything like ordinary dry spell.

"9 Q. From your knowledge of the two streams, which of them will carry the greatest amount of water down to the junction of the forks throughout the year?

"A. The main Red River—South Fork."

JNO. M. PASSMORE, cow-boy; known the country sixteen years; thirteen years in Greer county; hunted buffalo and

run cattle there before any white settler located; says from the head down to Elm, North Fork is a dry, sandy creek; from Elm to its mouth more or less water the year round, sometimes dry and sometimes water in it (Q. 7); plenty of water at Palo Dura canyon, and at times from there on down when it strikes a big, wide, sandy stream of water in holes (Q. 9); that, from his observation of thirteen years, South Fork carries most water into the river below (Q. 12); was with Timmons when they found a duck egg in the middle of the stream of North Fork, and the egg was not more than half covered over (Q. 15).

Horace P. Jones, born in 1829, Government interpreter at Ft. Sill for twenty-five years; in 1859 was with Gen. Geo. H. Thomas in expedition from mouth of Otter Creek to McClellan Creek on North Fork; says in right dry times the water sinks into the sand in both forks; South Fork a great deal widest (QQ. 5–6).

Jno. Burdick, blacksmith, Ft. Sill; cow-punching in 1878; been up both forks as far as there is any water; says "South Fork is the largest stream, the longest stream, and flows the most water, taking it the year round" (Q. 4); says South Fork from about two miles above the mouth of Terra Blanco down to the J. A. headquarters water runs the year round. At least it has to be an awful dry year before it dries up. Up above there it runs living water all the while about 55 or 60 miles (QQ. 13–17).

R. P. Sanders, known streams since 1876; lived at Doan's; seen both frequently, several times when along with counsel in this case; South Fork carries most water the year round (QQ. 1–22).

S. E. Stilwell, acquainted with the country for more than thirty years as scout and guide; at present police judge at El Reno City (Q. 4); compares Red River with the Canadian, and says: "From the mouth of the Big Wichita

River on down, the Red River furnishes more water, in my opinion, than the South Canadian does. From the mouth of the Big Wichita River up to about the mouth of Wanderer's Creek, which runs in on the south side some distance above, I should say it averages very well with the Canadian opposite this point. From there on west it is dry more than the Canadian River is" (Q. 33). "There is always water in the canyon; it is good water" (QQ. 35–37).

CHADDLE-KAUNGKY, a Kiowa judge, says: "There is always water there; it is not sandy like it is below; that is good water; the Kiowas camped there when I was a boy" (Q. 19 and map).

DEFENDANT'S WITNESSES.

W. B. KISER lived in the neighborhood eight years; says South Fork is the wider of the two streams (Q. 6); "has water in it, you might say, the greater portion of the year, but as a general thing there is not as much water in it as in the North Fork, and in the summer-time it goes entirely dry at times" (Q. 9).

"10 Q. When you say it has no water in it, do you mean flowing water or water standing in pools?

"A. It flows and gets low, and then after it quits flowing stands in pools in places. As the dry weather comes on the water gets lower and lower and settles, and sometimes settles in pools on the river after it quits running.

"11 Q. What is its special condition now, at the time you are testifying, as to running water?

"A. At present I expect the South Fork has the most water. I don't know of my own knowledge, however, of that fact, as I have not been to either stream for some time.

* * * * * * * *

"25 Q. Which discharges the greater volume of water the year around?

"A. The volume flowing from the two streams, you mean?

"By Mr. CLARK: Yes.

"A. I expect the South does. A big volume of water comes down there during freshets; it is longest.

"26 Q. How did you know it is longest; did you ever measure it?

"A. I never measured it. I do not know from measurement which is longest. The headwaters of North Fork are in Gray co., I think."

L. C. TALLY says the South Fork is nearly a mile wide at the Doan crossing. The stream of water is ordinarily 10 to 20 steps wide, and about ankle deep to a horse. He never crossed it when it was entirely dry (QQ. 9–12).

North Fork 85 to 90 miles long up to the 100th meridian (Q. 18). Is not certain from his observation which stream furnishes the most continuous flow of water.

His estimate is more guess-work than anything else. Trees show larger flow during freshets in South Fork (x-Q. 10).

JAMES T. POLLARD lived in Greer 3 years; says North Fork has more water "in sight" during the year (Q. 52); believes the sand bed in South Fork is caused by herds of buffalo as much as forty miles wide filling the river by picking up the turf and sand (Q. 24); estimates the flow entirely by the water in sight (QQ. 37–38). In the South Fork water will rise and flow during the night and disappear again early in the day (Q. 46); believes North Fork drains as much country as South Fork (Q. 47).

J. T. CRABTREE lived in Greer about seven years; says North Fork discharges the greatest flow during the year, unless there are a good many freshets (Q. 10); has crossed North Fork where the bed was dry and sandy for as much as 150 yards, with water lying in holes between the sandy breaks (x-QQ. 10–13). Elm Fork discharges more water

than North Fork (x-Q. 18); South Fork half a mile wider than North Fork during freshets (x-Q. 22).

W. S. PIERSON thinks North Fork discharges more than South Fork (Q. 17); considerable flow of water down South Fork during seasons of heavy rain; when dry has scratched in the sand from three inches to a foot deep and found water (x-QQ. 8–12); South Fork a great deal wider in bed of channel during high water (x-Q. 29).

W. E. GATES lived in Greer four years; only acquainted with stream twenty miles from junction of forks, on South Fork, and about 40 miles up North Fork; South Fork very wide, very little water except during high rains; North Fork plenty of water in it; large holes of water where they fish a good deal; never saw it dry; is a constantly running stream (QQ. 11–14); knows nothing about North Fork above the mouth of Elm (x-QQ. 2–3); claims over a section of land in Greer county (R. x-Q. 5).

H. C. SWEET, the first settler in Greer county, owns half the town of Mangum; about $1,200 county claims against Greer county, mostly jury scrip; pays taxes on about 1,200 acres, and has a located interest in some 20,000 acres more, never patented (x-QQ. 30–35); South Fork only runs a stream a short time after rains, while North Fork has a stream of running water nine times out of ten (QQ. 11–12); describes the errors in Marcy's map; Marcy makes Salt Fork empty into North Fork; Marcy leaves off Frazier River (Q. 13); Elm Fork on modern maps is identical as Marcy's Salt Fork (Q. 16). He settled in Mangum April, 1884; only one other family there; in July, 1884, Lieut. Crane, U. S. A., communicated to settlers an order for their removal by Oct. 1st. Governor Ireland instructed witness to remain and only be put out at the point of the bayonet. President Cleveland's proclamation "thereby hangs a tale" (see cross-exam. of witness); gives bond as postmaster at Man-

gum, I. T. (x-QQ. 26–9); the water in Salt Fork can be used, while that in Elm Fork cannot (x-Q. 41).

S. H. TITTLE, cow-boy in 1880, working cattle in Greer, never saw North Fork but once or twice that it had stopped running (Q. 7); no water in South Fork you might say for half the time during the year (Q. 9); has seen North Fork dry at times (x-Q. 10); thinks twice as much water "in sight of course" runs down the North Fork; South three or four times the widest (x-QQ. 13–14); water in all these streams near the surface; has dug down South Fork with his hands and a tin cup and got water when there was no water on the surface (x-QQ. 23–'4); does not include freshets in estimating flow in the North Fork (Rd. Q. 1).

J. H. SWINDELLS never saw South Fork but once, and that in the year 1860, and then only at one point (Q. 27); says Salt Fork empties into North Fork (Q. 29); only crossed South Fork in 1860 (x-QQ. 6, 16, 65); opportunities of observation two and a half days and did not follow the North Fork but crossed it twice (x-QQ. 51–54); has had no opportunity of observing the condition of either stream in different kinds of weather (x-Q. 66).

W. L. CABELL, graduate of West Point; resigned from U. S. Army April, 1861; in service in the Indian Nation for about ten years; never saw water in South Fork except during rains, and North Fork always furnishing plenty of water; never saw any water in South Fork but "back water" (Q. 17); always considered the North Fork a running stream except in very dry weather, and then there would be holes in all these western streams, "the same as the Canadian" (x-QQ. 61–'2); headwaters of South Fork 60 miles further west (x-Q. 66); some portions of North Fork a good deal wider than the South Fork (x-QQ. 67–'8).

See map with Van Dorn's report to show the South

Fork referred to is not the Prairie Dog Fork at all. A reference to Gen. Johnston's testimony also shows that the military engaged in the Van Dorn expedition regarded Elm Fork as South Fork, or Prairie Dog River.

JNO. PETER SMITH was in the locality for two or three days in the years 1858–'9, and from August to November, 1860; seems only to have crossed and not meandered the streams; found no water in South Fork except by digging in the sand, but found some running water where he crossed North Fork (QQ. 11–13); has seen South Fork where Buck Creek and Groesbeck Creek, both bold running streams, emptied into it, and describes it as follows: "You will find deep running water at the mouth of those streams and it seems to disappear; the water seems to sink" (x-QQ. 26–31).

RICHARD COLLINS; South Fork nearly a mile wide at Shanahan's crossing (x-Q. 5); knows nothing of North Fork above Elm (x-Q. 26). In answer to second redirect question by counsel for Texas the witness says:

"A. Whenever I crossed the North Fork—have not crossed it a great deal—there was always more water in it than in the South Fork, unless it was after these little freshets. I have crossed South Fork when it was dry and no water visible at all. You could not see any in it except in places up and down the stream where you could possibly see it in little holes."

J. B. OVERTON has seen the stream of South Fork near a mile wide during freshet (x-QQ. 9–12); has caught fish weighing 8 to 10 pounds each in tributaries of South Fork (x-QQ. 25–38). In answer to 2d redirect question witness says of the South Fork, "part of the time, when a freshet comes on, it just rolls down like a wagon and then dwindles down and goes out like a match burning.

DAVE MCBRIDE has caught fish in South Fork weighing 30 pounds or more (QQ. 23–25).

JONATHAN DOAN, familiar with the country since 1876; South Fork used to go dry prior to the freshet of 1891, but since then there has been right smart water, a pretty good channel, about 20 feet wide (Q. 11); Doan's crossing about ten miles from the mouth of Salt Fork and two miles from junction of North and South Forks (x-Q. 4); Elm Fork flows more water than North Fork (x-QQ. 15–17); crossed North Fork a great many times (x-Q. 18); North Fork above Elm similar to the South Fork in having water in holes (x-QQ. 22–23); accounts for South Fork being frequently dry from the fact that, where its tributaries empty in, the water sinks into the sand (x-QQ. 41–47); refers only to water "in sight" in saying North Fork discharges most water (x-Q. 49); from his observation of the two streams as far up as he knew, "more water is emptied into the South Fork from its various tributaries, which sinks into the sand, than is emptied into the main stream from the narrow bed of the North Fork at its mouth" (x-Q. 50).

Gen. R. W. JOHNSON (retired) was in Van Dorn's command in 1858–'9, as captain of Company F, 2d U. S. Cavalry; testifies that the North Fork has a wider bed and more water (QQ. 13, 16, 19, and x-QQ. 22, 23). It is a peculiarity of all western streams that they may run dry, but you strike water by digging (x-Q. 24).

Attention is again called to the Van Dorn map to show the mistake this witness is laboring under.

S. B. KENNEDY was only a boy of fifteen when he casually crossed the two streams.

M. W. HUDSON says: "At certain times of the year Red River has more water in it than the North Fork, and I think the North Fork runs at times when the Red River is dry" (x-Q. 26).

Jose Martinez lives in Greer county; his father killed by Indians when he was a boy; Spanish fort then; is 56 years old (Q. 8). In 1858 was on Pease River, Otter, Salt Fork, Elm, and all them streams (Q. 15); was hunting silver ore; says never saw South Fork run except when it rains, and when it quits raining the water sinks right in the sand; has seen the North Fork dry, but it runs more water than South Fork (QQ. 106–'8); North Fork would be dry for a quarter of a mile between water-holes (Q. 113).

Thos. K. Carmack. This witness was only on Red River once, in 1873, and does not think he was ever on North Fork.

Wm. Ish. The testimony of this witness was taken with no counsel present representing the United States. The same exceptions that might have been taken had counsel have been present may, by agreement, be taken now. There is nothing to show that the witness had any knowledge of Red River except of the most casual character. He lived for several years about twenty miles southeast of Vernon, and appears to have accompanied Mr. Freeman in an exploring expedition after this suit had been pending nearly three years, and testifies mainly from his observations on this trip in 1893 (for proof, see R. P. Sanders, QQ. 15, 37).

Thos. F. Roberts resided in Texas since 1836. He thus describes the two streams in 1840:

"x-Q. 33. Have you any recollection of the condition of the two streams, North and South Fork of Red River, at the time you crossed them in 1840?

"A. 33. I don't recollect particulars, but will say that they were both broad, sandy streams, a kind of quicksand, and banks low.

"x-Q. 34. Which was the widest?

"A. 34. I couldn't tell you.

" x-Q. 35. Was there any water in them ? If so describe the channels.

" A. 35. I have seen them both when there was no water in them for miles, only holes. Broad, wide, shallow channels filled up with sand.

" x-Q. 36. Have you ever seen them in times of high water ?

" A. 36. Yes, sir.

" x-Q. 37. Describe the streams relatively at such times.

" A. 37. Well, sir, the only time I ever saw them when they were high was in 1864, and I camped on the sand bar of the North Fork of the river, and there was nothing but little holes of water in the river when I camped there. In the morning, about daylight, I heard a roaring, and before I could get my things and get away from there I had mighty near to swim. That was the North Fork now. I crossed back to the south side, which placed me in the forks of the river. I travelled to the South Fork then, about four or five miles. I found it all over the sand bars, and it was spread out like the other, all over the country. For the life of me I could not have told the difference between the two streams from the amount of water in each."

W. F. Cummins, assistant state geologist of Texas, has been practically to the head of both streams ; says South Fork is the widest (x-QQ. 63, 68) ; at times there is a good deal of water flowing down South Fork, and at other times it is perfectly dry, when you can find water from 2 to 4 feet below the surface ; knows Groesbeck and Turkey Creeks ; they flow continually, but in dry seasons the water is absorbed by the sand in South Fork (x-QQ. 72–77).

" 78 x-Q. What is the difference between the bed of North Fork and the bed of South Fork ?

" A. There is more water in the North Fork ; that is, more water at the surface than in the South Fork. The sand does not seem to entirely absorb the water, for quite a distance at least.

"79 x-Q. Is that above or below the mouth of Elm?

"A. That is below.

"80 x-Q. How is the North Fork above the mouth of the Elm as compared with the South Fork in regard to the ordinary flow of water?

"A. The North Fork, both times that I have been there, was dry above the mouth of Elm.

"81 x Q. Its condition then was about the same as that of South Fork?

"A. Yes, sir.

"82 x-Q. One of your visits was in January or February, 1891?

"A. In 1891.

"83 x-Q. Have you in your scientific investigation, officially or otherwise, made any calculation as to the relative area drained by these two streams?"

Witness examines a map attached to his annual report of the geological survey of Texas and says it shows the headwaters of South Fork in the edge of New Mexico, those of the North Fork near the western part of Gray county, about 120 miles further east than the head of South Fork. (x-QQ. 89–96).

This witness further identifies the South Fork of Red River as shown on the map accompanying his report as practically coinciding with the boundary line laid down on the Austin map of 1836 when he testifies.

"114 x-Q. Please compare the Austin map with the map of the geological survey of Texas of 1889 as to the two main forks running from the north and one from the south, as shown from the Austin map, and state what streams they most nearly resemble upon the map of 1889.

"A. The direction or course of the rivers on the Austin map and the map of the geological survey of 1889 more nearly resembles the South Fork of Red River. The stream on the south side of Red River on the Austin map more nearly represents Pease River than any other stream

that I know. There is also a stream running into Red River on the north side of the Austin map, east of the 98th meridian, which more nearly represents the North Fork of Red River than any other which runs into the South Fork west of the 99th meridian. The other river on the north side of Red River, on the Austin map, running into Red River west of the 95th meridian, more nearly represents the Washita River as shown on the geological map of 1889."

This witness also testifies that the area drained by the South Fork is more than twice that drained by the North Fork (x-QQ. 2–3.)

He also identifies the Edwards map as showing the South Fork of Red River to be the boundary of the John Cameron grant (x-QQ. 31–34.)

Mr. Chas. Corner, the expert engineer witness of the defendant, testifies that the South Fork, near Newlin's station, had, when he saw it, a running channel of water varying from 100 to 300 feet, and that the bridge at that point, which was washed away, was 2,072 feet long, and showed the stream at that point to be 2,000 feet wide at highwater-mark (x-QQ. 5–12.)

This was nearly a hundred miles west of the junction of the two forks.

He also thinks that the area of the watershed of the South Fork is more than 3 times greater than that of the North Fork (x-Q. 56).

We insert here an extract from Senate Executive Document No. 70, being report of boundary commissioners under act of 1858, showing the relative condition of the two streams:

"Aug. 29th, 1860.—(North Fork.) Direct across channel 25 chains 44 ft.

"No water on the surface (*i. e.*) river bed, but is found by digging 2 feet 3 inches below the surface.

"Aug. 30th, 1860.—Start on scout for the main Red River.

"Aug. 31st.—Strike main Red River at 3.30 P. M.

" Main Red River where crossed is 65 chains 38 feet.

" Channel of running water 22 feet.

" Channel 6 inches deep.

" Plenty of long, large lagunes of water in the bed besides the running channel.

" The banks are red clay 25 to 40 feet high. Water unfit for use." (P. 108, Record.)

Jones and Brown found at the 100th meridian, North Fork, 23 chains wide. South Fork 76 chains 85 links. See also Marcey's report. (P. 73, Record.)

In the face of all this testimony demonstrating that the South Fork is the longest, the widest, drains the greatest area, and receives the greatest annual supply of water, the State of Texas has presented upon the record the evidence of two witnesses employed by the State to make a pilgrimage, covering about 36 days, for the purpose of meandering the two streams and testifying as to their respective characteristics.

This pilgrimage began October 23, 1891, as shown by the itinerary.

The first of these two witnesses, Jarrett Todd, testifies that he had but little acquaintance with the region of country previously (Q. 14 and x-Q. 61). The result of this trip, however, is that he thinks " the North Fork is the longest stream " (Q. 18). It contained at that time the most water (Q. 20), and he thinks it drains the greater area of territory (Q. 45).

This is about all the direct testimony of the witness on these points. In answer to direct question 19, however, he says:

"A. Well, from the mouth of Elm River to the source of the North Fork, approximately, I think it is about 225

miles to the source, and the South Fork from its source to where the Mangum and Quanah road crosses the South Fork, it is about, approximately, 220 miles."

The itinerary shows that they only commenced operations at the mouth of Elm, which is about 36 miles from the junction of the forks.

The 32d day in the itinerary shows the distance from the head of North Fork to the mouth of Elm to be about 275 miles, and from the head of South Fork to the Quanah bridge about 270 miles. He further says they found the source of North Fork in Carson county (Q. 38); then he says it heads in Roberts county (Q. 40).

This witness admits that he knows nothing about surveying, and had no collegiate education (QQ. 70–71). The utter absurdity of placing any reliance whatever upon his account of this trip can be best established by extracts from his testimony, showing that he started with "a *roadometer*," but had never seen one in his life before; abandoned its use, and relied for distances on his judgment, measuring distances of sixteen to twenty miles by eyesight (QQ. 73–86).

His system of computation is described by himself as follows:

"35 x-Q. Now, what means did you employ or what system of computation did you use by which you divided the time you were engaged away from the line of North Fork and that which you occupied in traversing near its banks so as to be able with anything like precision to estimate the distance from the mouth of Elm to the headwaters of the stream?

"A. Of course we didn't travel on time, because by the rate of speed we simply judged the distance as best we could; we had no chain or anything of that sort.

"36 x-Q. Well, in what way, then, do you reach the conclusion that it is five miles further from the mouth of Elm to the headwaters of North Fork than it is from the headwaters of South Fork to the Quanah bridge?

"A. Well, sir, we took into consideration the meanderings of the stream, the time that we were travelling, the length of the counties through which the stream ran; the width of the counties, rather.

"37 x-Q. Did you measure any of the meanderings of the stream?

"A. No, sir.

"38 x-Q. Well, did you allow so many miles per hour for the time you were engaged in the work on the North and South Forks respectively?

"A. No, sir.

"39 x-Q. When did you make your computation of distances, then; while you were away, or after you returned?

"A. We were making them daily, almost daily. We would inquire distances along the road, and would judge from the time we were on the road travelling.

"40 x-Q. Is it your experience in this section of the country that any reliance can be placed upon what people tell you on the way as to the distance from one place to another?

"A. No, sir; you cannot rely on that at all times.

"41 x-Q. And yet this was your main guide as to distance?

"A. No, sir; the inquiries were not my main guide.

"42 x-Q. Tell what it was.

"A. I can state it again: The time we were actually travelling on the road, the rate that we travelled, and by inquiry, taking into consideration the meanderings of the stream, and we would approximate the distances from that; and by a railroad map.

"43 x-Q. Did you keep a daily diary of these notes of travel by which you showed the distance travelled each day?

"A. No, sir; I do not think I did daily; that is in my diary.

"44 x-Q. Have you any memoranda at all that shows distances from one point to another from the time you left Elm Fork until you reached the headwaters of North Fork?

"A. Yes, sir; I did keep a diary as to distances, and

aimed to compute the distances from this roadometer I spoke of, but I abandoned that as I found it was not reliable, and therefore I had no other means only such as I have named by which to reckon the distance from.

"45 x-Q. How soon after you started and at what point did you abandon the use of your roadometer?

"A. Well, I abandoned it, as far as I was concerned, the first day—the first or second day; I saw we could not keep the main channel of the stream and it would be inaccurate, and I suggested to Mr. Settles that we abandon it." (See pp. 1029–'31, Record.)

The uncertainty and unreliability of this explorer are further manifest. He says it is "probably 15 or 20 miles, maybe further," from the 100th meridian to the Quanah bridge (x-Q. 54); as to the headwaters of South Fork, he says: "*I think* it is between 25 and 40 miles farther west;" "there is a *considerable portion* allowed for the meanderings" of the North Fork; "I would *calculate* that there would be between 70 and 100 miles difference;" "do not remember" the name of the map we had with us, and "do not know what became of it" (x-QQ. 57–65). And then the witness gives the following account of the so-called survey of the South Fork:

"x-Q. 82. I understand that you began your measurement of South Fork about 18 miles east of the line of New Mexico; is that correct?

"A. Yes, sir; that is, we supposed it to be about that distance.

"x-Q. 83. And you suppose that to be the source of South Fork?

"A. Yes; so we were told.

"x-Q. 84. Was there water flowing at the point at which you began?

"A. No, sir; it was not running, but a short distance below there it was running.

"x-Q. 85. How far below?

"A. I think some two or three miles.

"x-Q. 86. Did you go any further west from that point?

"A. No, sir.

"x-Q. 87. Well, upon what hypothesis did you travel forty or fifty miles beyond the running water in McClellan Creek to locate the headwaters of that stream, and not go west of the Palo Duro canyon in investigating as to the headwaters of the South Fork?

"A. In going to the head of the North Fork we were inquiring all the time for its source, and the people who lived there told us where the source was, and in tracing it, *and what the people told us*, we relied on that. We did the same thing in regard to the South Fork; the persons who lived there told us the source of the South Fork."

He says he knew nothing of the topography of the country drained by these streams, save what he saw in his tour of inspection (x-Q. 106).

The witness had written instructions from the attorney-general of the State, and when called upon to produce them said: "Instead of copying them, as I should have done, I sent them back to the attorney-general" (R. x-Q. 11, p. 1038, Record).

J. C. Settles, who seems to have been the head of this exploring party, and whose name is first signed to the report, gives the following statement in regard to the two streams and their system of measurements:

"50 Q. What is the approximate length of South Fork from its junction to its source?

"A. From the mouth of the river to the headwaters, from the best I can give, is about 250 miles.

"51 Q. About the same length as the other?

"A. The other is about 275 miles; about 25 miles difference.

"52 Q. How did you estimate that distance?

"A. When me and Mr. Todd went up we went from the mouth of Elm. From there up we had a roadometer with

us, and me and him kept account of it. When we started, we started to keep up the bed of the river and follow that close up, and keep the roadometer working and keep particular count of it. We got up the river some, and found there were so many sand hills and it was so terrible rough that we could not drive up, and we had to pull up back in the hills and he (Mr. Todd) quit keeping tally at all, and I then kept tally of it all the way on the buggy wheel.

"53 Q. Upon what now do you base your estimate of the length? Do you base it solely upon the measures of the roadometer?

"A. No, sir.

"54 Q. What else?

"A. Not on the roadometer, because there were a great many places in the river where we could not do that—a great many crooks, but we estimate it from our travelling and from taking that, too. We would look around and approximate while we were in sight of the places. I profess to be a pretty good judge of calculating distances from my experience on the frontier.

"55 Q. What experience have you had in estimating distances on the frontier?

"A. Only from travelling and from estimating and guessing distances from what others said. We would inquire the distance from place to place along and get information from the people. We went up the river and down too."

This witness says the North Fork discharges the greatest volume of water and drains the greatest area of territory (QQ. 78–79); there was no running water in the South Fork all the way down, but there were holes of water half a mile to three-quarters of a mile long (Q. 74).

In cross-examination this witness says he has no education at all; he cannot read; can sign his name, but very often makes his mark; says that Elm Fork furnishes more water than North Fork does above the junction, but goes dry sometimes (x-QQ. 22–25); "most of the creeks and canyons have more water than either the North or South

Fork; the beds of the rivers are sandy and flat like" (x-Q. 39); believes North Fork drains one-third more territory than South Fork (x-Q. 61). He claims three sections of land and some mining claims in Greer (x-QQ. 72–76).

The witness thus describes his experience with the odometer:

"A. Well, sir, there are two cylinders to this instrument. One notch gains one or counts one every time the wheels go round, and counts it up until it gets up to another number, when it turns the other. Before we started we tried to see how far it took that thing to turn a hundred times, and it came out right in the neighborhood of a quarter of a mile, and from that bottom cylinder, every time the top calendar goes around a hundred times, the bottom calendar goes one. When we counted it up at first it had made twenty-three miles. Now, whenever that run out I would set it down. It did not stop that thing, it just kept going right on, and, of course, I could see at night just where it run out. There could be no mistake in this; none at all, unless it run out in one day. I kept an account of it in that way, and Mr. Todd and I counted it up, and while he had no confidence in it, because we could not follow the exact streams, and he did not think it was working right, at the same time he counted it up." (Pp. 1060–'61, Record.)

This witness, too, confesses that they went no further west than Tierra Blanca canyon, although the map they had with them showed the head of the stream further west. He says:

"x-Q. 127. Did you examine the map to see how far west it ran?

"A. Yes, we examined the map; it was marked on the map some further out than we went, but we went by the information *of the best man's word*, a man who had lived there seven or eight years, and one man living in there seven or eight years, considered to be living on the headwaters. He gave his opinion that that was the headwaters, and we

passed about five miles above that, where the water was standing in holes.

" x-Q. 128. That was on the Tierra Blanco canyon?

"A. Yes; what is termed as the head of Red River, South Fork."

This testimony, we think, will hardly outweigh the evidence of witnesses like Maj. Clous, Messrs. Goodnight, Meers, Fletcher, Bogard, Anderson, Maddox, Lawson, C. F. Doan, Dr. Wood, Timmons, McBride, Dooling, Barnett, Squire, James, Hunter, Banks, Grooms, Cockrell, Tierce, Passmore Sanders, Burdick, Stillwell, and Jones (the complainant's witnesses), corroborated as they are by the following witnesses for the defendant on each of the several points in controversy: Messrs. Kiser, Talley, Crabtree, Tittle, Overton, Jonathan Doan, Roberts, Cummins, Corner, and Marcy's report.

EXPERT WITNESSES.

The three conditions of length, width, and area of territory drained having been established in favor of the South Fork substantially without conflict, and the weight of testimony from those familiar with the streams by long observation preponderating largely in favor of the South Fork in regard to the annual amount of water received by the respective streams, the State of Texas, after this suit had been pending more than three years, has attempted to establish by scientific observations of Mr. CHAS. CORNER that at a given point on each of said streams the indications show an advantage for the North Fork over the South Fork in the following proportions:

" 14 Ans. It would be as 13 is to 15, the smaller number representing the Prairie Dog Town or South Fork; on account of the shape and greater friction in the bed of the

latter, the North Fork would flow with a greater mean velocity of nearly 20%. For instance, in a shallow stream of the character of the Prairie Dog Town Fork the maximum velocity would be at or very near the surface. In a cross-section of the general form of that of the North Fork the maximum velocity would be at $\frac{1}{3}$ the distance from the surface to the bottom. The velocity of the bottom of the South Fork would be little more than $\frac{1}{2}$ of the velocity of the surface. The velocity of the bottom of the North Fork would be $\frac{3}{4}$ of its maximum. The mean velocity of the North Fork compared with 1 as its maximum would be .88, and that of the South Fork .75."

The above conclusion was reached from observations which, upon the two streams combined, occupied not more than four days in the month of December, 1893 (x-Q. 36). The witness was not familiar with either of the streams prior to this trip, and since his instructions placed him under the general direction of Mr. G. R. Freeman, of counsel for the State, it is a fair presumption that in selecting the points of observation the witness was not uninfluenced by his general director. The point selected on the South Fork was at the apex of a bend about three miles west of the forks, at which point the width of the channel at the high-water line was found to be 3,160 feet. The point selected upon the North Fork of Red River was about two and one half miles below its junction with Otter Creek. The basis of calculation was not the ordinary flow, but an unprecedented flood which occurred on June 4, 1891, described by the witness as the "highest water known; all bridges on Pease and Red River washed out" (Red River meaning South Fork, as there never was a bridge across North Fork). (See ans. to 10th direct question.)

It is worthy of note also that the point selected for the observation of the North Fork was immediately below two of its tributaries, one of them being only a few hundred

feet above the point selected and flowing from the Greer county side, while the other was the mountain stream called Otter Creek, which was something over two miles above and emptied into the North Fork from the opposite or Nation side (Q. 13).

The witness, after this cursory, partial, and inconclusive test, ignoring the question of length, width, and area drained, concludes from his single experiment that the North Fork is the principal river (Q. 19), because he was able to demonstrate that at a chosen spot, as the result of an unprecedented freshet, on a single occasion, the water reached a higher level in the North Fork than in the other stream at that time, and he presents the following *argument* in answer to questions 21 and 22:

"21 Ans. If a river be not a source of water supply and is not navigable its importance is directly as its volume. Area of watershed is a factor to determine this conclusion; so also is the length of the stream. The other factors which go to make up this sum of volume are rainfall and springs, relative porosity of the soils of a watershed, and evaporation. If I were to take this factor of area of watershed for the sum of the volume, then the South Fork might appear to be the most important river. In this way the Pecos could be proved a greater river than the Hudson, and, omitting the considerations which I have mentioned, the Sahara Desert would seem to be more important to mankind than the Mississippi valley.

"22 Q. If the area of watershed of the South Fork of Red River be three or four times as great as the area of the watershed of the North Fork, what facts known to you would explain a greater flow of water in the North Fork?

"22 Ans. For flood waters the porosity of the soil and the notorious sinking of all the waters of the plains in the direction of the sources of the South Fork and its tributaries, and for its normal flow the same conditions aggravated by the equally well-known aridity of its watershed. The evaporation from its wide and shallow bed would also be

considerably greater than in a narrower, deeper stream, and much more so than in proportion to the width. The sands underlying such streams as the Prairie Dog Town Fork become in the summer-time appreciably hot and the whole volume of the river is warm."

The evidence is overwhelming that the North Fork above the mouth of Elm (36 miles from its mouth) is comparatively a narrow, dry channel, similar in every respect to the South Fork, while the testimony of those living for years on that stream below the mouth of Elm proves a similar condition as frequently existing almost to the junction of the forks. We submit that as a test of the annual flow the evidence of Mr. Corner as to which is the principal stream is as unsatisfactory and fallacious as it would be if he had selected a standing hole of water in each of the forks, the one on the North Fork being at the entrance of a principal tributary, and the one upon the other near the mouth of an insignificant rivulet.

The Texas boundary commissioners of 1886 evidently reached the conclusion, as a result of their superior knowledge of these two streams, that they could not rely upon the claim that the North Fork was the main stream, for in a communication dated March 11, 1886, Mr. Brackenridge, addressing the United States commissioners, says: "We deny that the Ke-che-ah-que-ho-no River, or Prairie Dog Town Fork, so-called, is wider, larger, and drains a larger area of territory. All this may be true, and we may admit it when on the field, as, in the view held by the Texas commission, these, if true, do not determine the real question. * * * The real question is, was the North Fork the Rio Roxo of the treaty and laid down on Melish's map, or was the Prairie Dog Town River, which was known by the framers of the treaty, which was known prior to that time, *which* was laid down on Melish's map, which stream,

whether it be large or small, long or short, wide or narrow, deep or shallow, was really intended by the treaty" (p. 163, Record)? (See House Executive Doc. No. 21, 50th Cong., 1st sess.)

And in the same communication it is substantially conceded that the conditions which are shown to exist established the conclusion that the South Fork was the main stream; but, as already shown, it was contended that this made no difference unless it was the treaty stream and so recognized by name at the time. Mr. Brackenridge, the chairman of the commission, says:

"We submit that if now, for the first time, the joint commission were called upon to examine the Red River, embracing the said two forks, and to the sources thereof *and no names had been applied thereto*, and the single fact was to be found which was the main stream of Red River, then the ordinary rules applied to all rivers would govern; the greater width of the stream, length, flow of water, and the area drained, would be held the main river, and no doubt this finding would be unanimous" (p. 107, Record).

The italics in the last paragraph were not in the original, but are placed there to emphasize the point relied upon by the Texas commissioners as to the name of the stream at the date of the treaty. And Mr. Corner, though never in Northern Texas until the year 1893, seems to have been impressed with the same view; for when he was asked as to whether Elm Fork or North Fork above the mouth of Elm was the main stream of the two (conceding Elm to have the greater flow) he replied, in answer to the 65th cross-question:

"63 Ans. If the main stream had *no accepted name* I would determine it by the volume of its flow, from the best evidence from all sources from which I could gather information.'

The fallacy of the method, reasoning, and conclusions of Mr. Corner in regard to these two streams is shown by the testimony of Gen. HENRY L. ABBOTT, an officer in the United States Corps of Engineers, with more than forty years' experience, whose service in connection with rivers began in 1857, on the Mississippi, and has been continuous in connection with the various rivers of the country ever since. This witness says:

"4 Q. Of what value, from a scientific standpoint, would be the report of a measurement of a single cross-section of the stream on a given date in aiding a determination as to the annual flow of water over its bed?

"A. Of no value whatever. One might as well attempt to determine the number of persons passing through a street during the year by knowing the width of the street.

"5 Q. How far is it possible to determine the average velocity of a current by the measurement of a single cross-section of the stream?

"A. It is impossible to form any idea whatever, unless you know the accurate slope of the surface corresponding to the cross-section."

The attention of the witness was then directed to Mr. Corner's answer to question 14 (which is quoted in this brief) and he was asked:

"Could this method of measurement determine, by the single observation made, anything reliable as to the comparative annual flow of water over these two streams?"

To which Gen. Abbot replied:

"A. It could not. The rules, or the figures, rather, which have been given are by no means uniformly applicable. The change in velocity from surface to bottom is shown by the abscissæ of a parabola of which the axis is horizontal. In all streams this axis is usually below the surface. Our

observations on the Mississippi River showed that in that stream it was generally about one-third of the depth below the surface; but the form of the parabola at any particular locality can only be determined through actual measurement, as it varies through very wide limits. To infer from the cross-section of a stream the distribution of the vertical velocity would be to go far beyond our present state of knowledge as to the flow of water in natural channels."

(See also x-Q. 17.)

In answer to the 16th question Mr. Corner testified that he formed his judgment in part that the North Fork was the dominant stream because of the continuation of its course beyond the confluence of the forks. General Abbot concludes that such a determination is in conflict with the invariable rule. He says:

"A. The tributaries generally have the greater slope. The main stream follows the lowest line of the basin. That is almost an invariable rule, unless in the case where there are cascades or rapids."

It will be borne in mind that this rule particularly applies to the two streams in controversy, the South Fork flowing from the west over and through a flat, sandy bed, while the North Fork traverses a country studded with mountains or generally rolling in character.

The suggestion heretofore made in this argument that Mr. Corner, in conjunction with Mr. Freeman, who directed his movements, selected the point on each stream at which his observation was made, and that such fact might affect the value of his testimony, is sustained by Gen. Abbot in his answer to the 10th question, as follows:

"10 Q. The same witness, in answer to the 54th cross-question, speaking of the two streams referred to, says:

"The width of both streams varied very greatly at short distances."

"How does this statement of conditions affect the value of any determinations as to the annual flow of water over each stream when such determination was arrived at by a single observation over only one section of each of said streams?

"A. It would show that no value whatever could be attached to such measurement, as the selection of the locality would practically determine the result reached. The judgment of the individual would be the only guarantee of a correct determination."

Referring to the fact that Mr. Corner had seen near Newlin's a channel 2,000 feet wide, together with the fact that the North Fork north of that point is a very narrow and insignificant stream, Gen. Abbot says that observations made further up the streams would afford a very much better basis for determining the relative volume of the streams and their relative importance than any such measurement of a limited number of cross-sections near the junction.

And then the following hypothetical question was propounded to Gen. Abbot; and his answer thereto is presented to the court with the confident belief, based on the ripe experience of the witness and on the presentation of the exact facts of the case, that it must remove all doubt, if any exists, that the South Fork is the main Red River above its junction with the North Fork.

"12 Q. I will ask you now this hypothetical question

"If it be a fact that the water discharged by the North Fork of Red River into the main stream at the junction is mainly contributed by the stream called Elm Fork, which enters into the North Fork from the east, and not more than forty miles from its mouth, while above the mouth of Elm the North Fork has a comparatively dry bed throughout most of the year, and it also be a fact that the bed of the South Fork is four times the average width of the North Fork, that the South Fork is many miles the longest stream

and drains three times the area of watershed the North Fork does, and that at a point 150 miles from its mouth, or thereabouts, the South Fork has a continually running stream of water covering a distance of from twenty to thirty miles which, when received into the dry, sandy bed of the river, is absorbed by the sand, and thus carried down its bed, how far would these relative conditions of the two streams aid in reaching a determination as to which was the main stream?

"A. I think they would be decisive in showing that the South Fork should be properly considered the main stream."

Major Wm. R. Livermore, an engineer officer of the United States Army, says: In the absence of proper means of gauging those streams, I think that most engineers would be guided by the area drained" (Q. 81).

Maj. J. W. Clous testifies: "The source which I believe to be the Red River is located about one-third of a degree west of the 103d meridian." And speaking approximately as to the area drained he says: "I should say the ratio between the North Fork and the main river, according to my judgment, would be about as 1 is to 4" (QQ. 6–7).

Color of the Waters.

It would seem to be an immaterial point as to the color of the water in either of the two forks of Red River, but it has been heretofore contended on the part of the State of Texas that North Fork was called *Red* River "from the very red water which flowed in it, which became much redder from a rise, * * * and this red soil was only above the mouth of Prairie Dog Town River." (See deposition H. F. Young, p. 937, Record.)

It was on the evidence of this single witness that the Texas boundary commissioners in 1886 insisted that the relative color of the water formed a factor in the contro-

versy. They say: "Again, the Indians, in giving names to streams and natural objects, use that name which describes some quality of the thing named. This being true, it would hardly be possible to mistake or doubt which of these streams was Red River." They say: "It distinctly appears in evidence that Red River flows through red clay formation, while Prairie Dog Town River flows through a whitish soil worked up by prairie dogs; the one causing red water, the other whitish; Red River the name of one, Prairie Dog Town River the other. Fragoso, in his expedition down Prairie Dog Town River in 1788, named it Rio Blanco, or White River, no doubt for the same reasons that the Indians named this river. And Young in his testimony says in his experience of twenty years' residence on Red River he could always tell, by looking at the rise in Red River far below the forks, from what stream the rise came by the color of the water" (p. 108, H. Ex. Doc. 21).

This is an allegation boldly urged in the answer filed by counsel in this cause (pp. 15–16, Record).

We therefore cite the following testimony to show that the waters of the South Fork are redder in color than those of North Fork:

Chas. Goodnight (Q. 23); A. J. Meers (Q. 25); J. W. Wilson (Q. 12); C. F. Doan (Q. 42); A. L. Yeckley (Q. 11); W. A. Hunter (Q. 9); Wm. Cockrell (Q. 12); S. G. Banks (Q. 16); G. R. Grooms (Q. 13); J. C. Settles (R. x-Q. 131); J. H. Swindells (x-Q. 66); W. L. Cabell (Q. 17); Simon Cockrell (x-Q. 26).

The fact that Fragoso refers to the stream as Rio Blanco (White River) is certainly no evidence either that it was known by that name previously, or that the name signified the color of its water. (See his itinerary, p. 908, Record.)

He nowhere mentions the color of the water in any part of the stream, or as affected by any of its tributaries, and there

is no evidence that the name Rio Blanco was ever applied to it by any other human being either before or since, while it is certain that the fact of its ever bearing that name was unknown until the year 1886, and no map ever published designated it as such. The Texas commissioners in their argument on June 24, 1886, bear testimony to the facts just stated, as already quoted. They say:

"In fact it was never explored and published until 1852, by Capt. Marcy. Fragoso had as well never traversed Rio Blanco as to have done so and had his manuscript filed away until ninety-eight years afterwards." (P. 119, Record.)

Ancient Names of Streams.

Much stress, as already shown, is laid, in the answer to complainant's bill, upon the assumption that at the date of the treaty of 1819 the "Rio Roxo of Natchitoches, from its mouth to its source, was well known to the Spaniards, as well as to the Indians and trappers of that region of country, as the stream now called Red River;" and that each tributary stream was known and designated by particular names, and especially was this true as to the Ke-che-a-que-hono, or Prairie Dog Town River, which was as well known to the Spaniards and Indians as Rio Roxo" (pp. 14–15, Record).

We will divide the evidence as to the ancient names of North and South Forks of Red River into two branches: first, the evidence of white men; second, the testimony of Indian witnesses. Under the first head we maintain and contend that until 1852, when Marcy's map was published, no historian, or geographer, or map-maker, ever designated either of the forks by the names applied to them by Marcy. Ke-che-a-que-hono was first published to the world in 1852 as the Indian name for the stream which Marcy declared

was Main Red River, but which the De Cordova map laid down in 1848 as South Fork.

In 1788 Fragoso described North Fork as Rio de las Plumas, Main Red River as Rio Blanco.

In 1804 Humboldt names the stream Rio Rojo de Natchitoches in its upper and middle waters, and Riviere Rouge in its eastern waters.

In 1807 Pike calls it the Rio Colorado de Natchitoches.

In 1818 Mr. Melish shows two forks, one named Rio Rojo, the other (the North Fork according to Mr. Corner and others), but having no name.

In 1820 Maj. Long describes the stream as Rio Roxo del Natchitoches or Red River, without northern or southern tributaries west of the False Washita.

In 1822 Cary and Lea seemed to lay down the North Fork and South Fork heading near the 35th parallel of latitude with a southern tributary at about 101° west longitude.

In 1823 Mr. Melish corrects the errors of his former map, and, showing both forks, describes the boundary or southern stream as Rio Roxo or Red River.

From 1830 to 1844 the colony maps recognized the South Fork as Red River.

In 1844 Maj. Emory shows the South Fork as Red River with two northern branches west of the False Washita, and east of the 100th meridian.

In 1846 Desturnel calls the stream west of the False Washita Rio Colorado, with northern forks similar to Emory.

In 1847 Desturnel makes no change.

In 1849 the De Cordova map, of which Gov. Houston said "no map could surpass this in accuracy and fidelity," lays down the North Fork as Dog Fork, and the South Fork represents the Ke-che-a-que-hono. It is very doubt-

ful if up to this time any other name than those just cited was known for the south fork of Red River.

Some attempt has been made to show by several old men that they were familiar with the name Prairie Dog River at a very early date.

Simon M. Cockrell, 93 years old, living in Archer county, has testified to the remarkable romance that from 1833 to 1836 (when there was no white settlement for some 200 miles to the east of him) he lived between the mouth of North Fork and the mouth of Pease River on Prairie Dog River; that Pease River was known by that name at that date, and that he saw it laid down on a Mitchel map which one of the boys with him, had. He describes the building of a fort at the point indicated, and asserts that about twenty-five white men occupied it originally; that all left but seven, and these seven remained there until 1836, when the witness left the others at the fort and went to join the Texas army. (See Roberts' ev., x-QQ. 1–3 and Red. Q. 12.)

His whole story is incredible. Pease River had never been heard of as such, and was unknown by that name until 20 years later. (See Wm. Kyle, x-Q. 31, and Pressler's map of 1858, Ex. 6, p. 292, Record.)

Again, the witness locates the point where he was upon Red River as being northeast of his home in Archer county, while the mouth of Pease River lies many miles to the west of that location. When asked if he knew the names of any other streams in that locality, he replies in the negative and says, "We called them by names that we gave to them ourselves." It is not astonishing that so old a man as Mr. Cockrell should remember so little or have forgotten so much, especially when he says, "It has been a long time since I was there; I have a very little knowledge—can just read a little, and can barely sign my name" (x-Q. 35). But it is

remarkable that 60 years ago he should have learned the three names, Red River, Prairie Dog Town River, Pease River, and that as to every other stream in the country the men had to give names to them themselves, and yet he could not remember a single one.

Surely, if any such daring enterprise as he claims to have participated in had ever been undertaken and accomplished, the event would have been emblazoned in the history of that identical period, when the bloodiest butcheries of the barbarous border tribes were enacted. (See H. P. Bee, Q. 17.)

There are some events that transpired between 1833 and 1836 in that very region that this witness must have related had he been there at the time designated.

1st. It was in 1834 that Col. Dodge's expedition went from the mouth of Washita, beyond the North Fork of Red River, and visited the Comanche and Toyash villages.

2d. No traders or trading post had ever been in that part of the country before Col. Dodge went on that expedition (p. 166, Record).

3d. It was in May, 1834, that Judge Martin was killed by the Kiowas, and his son recaptured by Col. Dodge at the Indian village (p. 172, Record).

4th. Mr. Catlin locates the massacre as being near the mouth of the Washita, where the command under Col. Dodge was camped (p. 846, Record).

5th. In 1835 a small colony attempted to locate near where Austin is situated; erected a fort for their protection, and in May, '36, they were exterminated in a contest with the savages, which the historian tells us "shall ever live in the hearts of the countrymen, as does the recollection of San Jacinto and the Alamo," while a second attempt to locate at same spot three years later was abandoned because of the continued hostility of the Indians (pp. 171–'72, Record).

The old gentleman has evidently mixed the dreams of his youth with recent lessons in modern history of his State, and has thus fallen into the error of supposing his location was hundreds of miles to the west of where it could possibly have been. Ke-che-a-qne-hono was too hard for his untutored mind, and though he saw hundreds of Indians at his fort he does not seem to have learned a single Indian name.

Solon A. Loving, the defendant's witness, has lived in Texas since 1844, and was acquainted with the river from the forks down to the mouth. He says "they called them the Forks of Red River" (QQ. 4, 5). The scouts and rangers referred to them as the forks of Red River (x-QQ. 29, 37).

R. H. Burnett was with Capt. M. T. Johnson in 1848, who called the next river to Pease River Prairie Dog River, and he (Johnson) called the other river the North Fork (QQ. 13, 17, and x-QQ. 21–23).

Jose Martinez, age 57, was on both forks in 1858; says the Mexicans called Main Red River Rio Colorado de Natchitoches (Q. 49). He means the North Fork (Q. 53). The Americans called it the Red River (Q. 56); South Fork called Prairie Dog River (QQ. 59, 63). The Mexicans called it Rio las Peros—the River of the Dogs (Q. 64). Dr. Sturm (an old scout) always did call it North Fork; has heard Indians call Main Red River, below the forks, "Pia-passa-hono" (Q. 90); heard Comanches call it Parwasup above the forks, which means dry river (QQ. 91–92).

Gen. H. P. Bee (p. 1219, Record) was examined before boundary commission in 1886; in March, 1843, accompanied Col. Eldredge from Washington, on the Brazos, to make treaty of peace with wild Indians; that Jim Shaw, Indian guide, pointed the North Fork of Red River out as "Red River;" says he cannot describe the South Fork, and proceeds in his answer to question 13 as follows:

"My memory is too uncertain to describe the South Fork of the Red River, although I think that in my testimony given in Austin before M. S. Dunn, notary public, I may have stated or described what is now known as Prairie Dog Fork of Red River. *I am now uncertain whether it may not have been the salt branch of Red River or some of the other* streams of that country, but what I want to say is that all I know about those rivers is what Jim Shaw told me, and as fifty years have elapsed it is possible that his description of a river which he called by an Indian name, which I do not now recollect, but which was doubtless Prairie Dog Town River, may have led me to believe that I saw that river; but from the course as laid down on the maps of the South Fork of Red River *I do not think it was in the direction in which I was travelling*, and I make this explanation because what I may have said concerning this river was after a lapse of long years, and doubtless a confusion of ideas. *I don't think I ever saw the South Fork.*"

This intelligent witness, when asked again as to the river which Jim Shaw called Red River, says in answer to question 18:

"A. When we reached Red River, a stream probably a mile wide, and shallow and salt, but from whose banks trickled streams of pure water, we naturally asked, What river is this? His reply was, It is Red River. Afterwards—probably a month afterwards—when in the course of our wanderings we came again to a large river, he said, This is the same river that we crossed below. *This stream was the North Fork.* He did not call any other stream above the forks by the name of Red River."

It is extremely doubtful if Gen. Bee or those with him ever saw North Fork of Red River at all. He admits that his guide was so ignorant that he carried them for two days and nights through a country where they could get no water to drink; the streams were all salty (x-Q. 15). He judges it was the North Fork by the maps he sees now, but says

the water in it was not fit to drink, and that his recollection is that the stream was about a mile wide (x-QQ. 21–24). In his answer to the 15th cross-question he says:

"A. We ascended Cache Creek a distance, I suppose, of thirty miles, to a village of the Wichita Indians, situated on the south side of the Wichita mountains; from there we took a southwesterly course through immense prairies which bordered that region, looking for the Comanche Indians. I recollect encountering a district of country in which the streams were all salt, in which, through ignorance of our guides, we travelled two days and nights without water; this district might have been *beyond the North Fork of Red River*. I am not certain where it was."

The next day Gen. Bee, in the continuation of his deposition, asks leave to make a correction, which he did as follows:

"In my previous testimony I stated that on leaving the Wichita village I travelled a southwest course. I wish to correct that statement, as I should have said *a northwest course;* that in crossing the Red River at the mouth of Cache Creek I ascended that creek to the Wichita village; thence started in a northwest course to look for the Comanches, during which time *I crossed the Red River twice in the course of fifteen miles' travel*, and it was at that time that Jim Shaw told me that it was the same river that I crossed below; a southwest course would very soon have carried me back near the point I had first crossed the river."

And then, in answer to 27th cross-question, the witness says he had refreshed his memory by having his children read to him the journal of that expedition of 50 years ago.

It was probably ten days after leaving the head of Cache Creek and going northwest before they crossed Jim Shaw's Red River (x-Q. 32).

A glance at any map showing the location of Fort Sill,

which the witness refers to, will show that they could not possibly have touched the North Fork of Red River (x. Q. 29).

Col. JNO. S. FORD, another witness for the State, who had also been examined by the boundary commission, testifies that he was through the same region of country in 1858, in the same expedition with Ross and Van Dorn. He says: "What we called Pease River the Indians called Ke-che-a-que-hono" (Q. 7).

Counsel for Texas, staggered by this testimony, asks the leading question whether or not he refers to the stream "usually known as South Fork of Red River." On objection the question was withdrawn and put in another form, and the witness replied that the South Fork was then understood to mean Pease River (Q. 9). The witness then says he crossed Red River below the mouth of Pease, and that the stream he calls Otter Creek empties into Red River above ~~below~~ Pease River.

If this is correct he must have mistaken Cache Creek for Otter Creek, and this confusion of names and identity must certainly shake the value of all testimony based upon such slender opportunity, and lead the court to consider it *cum grano salis*.

Counsel returned again to the effort to have the witness correct his statement that Pease River was the Prairie Dog River of 1858, as the following extract will show:

"15 Q. You have answered that the South Fork of Red River was then understood to mean Pease River. There is now a river running into Red River below the South Fork of Red River called Pease River. State what you understood at that time as to which of these rivers was South Fork of Red River.

"(Question objected to by the counsel for the United States as leading.)

"A. I understood Pease River was the South Fork.

"16 Q. State whether or not any other stream than the North Fork that you have mentioned was called by the Indians 'Red River?'

"A. I have already said that they designated that Red River,—the North Fork.

"17 Q. Was there any other fork of Red River in that region of country called Red River within your knowledge?

"A. No; not that I know of."

The hurtful declaration still remained unbroken, and later in the day counsel returned to the contest as follows:

"24 Q. I will now ask you whether or not you were subsequently to your first campaign mentioned again on the upper waters of the Red River.

"A. I was there again in 1859, assisted by the Indians.

"25 Q. What opportunities had you then for knowing what those streams were called by people who were formerly acquainted with them, and who were those people?

"A. I crossed Red River and proceeded to camp Radziminski; from there I crossed the Red River below the mouth of Pease River, and proceeded up said stream; the people were the same Indians I had out with me before, and several of the same men, and they designated the river as Pease River.

"26 Q. You say you crossed the river above Radziminski. Now you also say that you then proceeded to and up Pease River. Now please state whether or not there was any river between the river you crossed above Radziminski and the river you called Pease River, which you struck after crossing the river above Radziminski.

"A. None that I know of.

"27 Q. Is it true then, or not, that the first river west of the river that you crossed above Radziminski, or southwest of that stream, is the river that you have termed South Fork and Pease River?

"A. That is the one I understood was Pease River.

"28 Q. Were you acquainted with Hugh F. Young?

"A. Yes, sir."

The record shows that the cross-examination of Col. Ford was commenced before any recess was taken for dinner (see x-Q. 42). In this cross-examination, on cross-questions 3 to 11, the witness reiterates his former testimony that the Indians called Pease River Ke-che-a-que-hono; his attention is called to the fact that the Pressler map of 1867 lays it down as South Fork or Pease River. He says he reached his conclusion by having been on it himself, and by the testimony of men well acquainted with the country, and he concludes by saying that unless the Pease River is the Ke-che-a-que-hono the names of streams in that locality must have been changed since he was there.

The witness only recollects seeing Prairie Dog River once (R. x-Q. 1).

After recess for dinner, and while the witness was still under cross-examination, he requested to be allowed to make an explanation (see cross-examination, QQ. 43–53), from which it appears that during the recess Mr. Freeman, of counsel for the State of Texas, had shown the witness a printed copy of his testimony before the boundary commission of 1886; that they had gone together to an office where he examined a map, and, finding his evidence given before dinner in direct conflict with his former testimony, he withdrew all he had stated in regard to Pease River being the Ke-che-a-que-hono; said he was mistaken, and reiterated his former evidence that the South Fork, and not Pease River, was the one to which the Indians gave that name.

It is respectfully submitted that the exhibit made in the examination of Gen. Bee and Col. Ford, being so directly in conflict with the *ex parte* examination of the same witnesses before the boundary commission of which Mr. Freeman was a member, should operate to lead the court not to consider any other of the evidence taken by said commission, as it is manifest that a cross-examination of the sev-

eral witnesses would most probably present a different statement of facts to those shown in the record.

Attention is called particularly to the evidence of Hugh F. Young in his answer to the 3d direct interrogatory, which shows pretty clearly that he was answering with the treaty of 1819 before him as his guide, or else that the "early American settlers, native Mexicans, and Indians from the Indian nation" had learned the treaty language by heart, and possessed an astronomical and geographical knowledge far beyond the ken of Melish, Marcy, or McClellan. It is incredible that the untutored Indian should have located the 100th meridian "on up the so-called North Fork of Red River" instead of east of the forks, when the treaty map and the line located by McClellan are each so far to the east of where these Mexicans and Indians instructed Mr. Young "the eastern boundary of Texas was located under the treaty of 1819."

It is not denied that the South Fork of Red River was often called Ke-che-a-que hono, especially after Marcy's designation in 1852; but we contend that this name only became a common appellation among friendly Texas Indians, for Gov. Ross, Gen. Johnston, and other witnesses have testified that the Indian guides and scouts were such friendly Indians. It seems much more likely that the Indians were taught by the whites than that the whites were taught by the Indians, for the whole record of testimony introduced by the State of Texas on this point fails to discover a solitary Indian who used any Indian name for any other stream than Ke-che-a-que-hono, and every tribe strangely used this Comanche name. Fragoso never knew it by that name; no map-maker before Marcy ever heard of it as such; Mr. Creuzbaur, in 1849, knew no stream of that name; Geo. Catlin was ignorant on the subject; the Spanish and Mexican archives filed by Texas give no color

to such a contention; Louis De Onis, the Spanish Minister, with all his knowledge, mentions no such name, and there is no reliable evidence that it was known by that name at all until more than a quarter of a century after the date of the treaty.

While admitting, therefore, that in years subsequent to the date of the treaty friendly Texas Indians and others called the stream by that name, it is denied that it either had an origin sufficiently remote to connect it by that name with the date of the treaty or to make the fact a factor in this controversy.

It is a little remarkable that the State of Texas should have avoided introducing a single Indian as a witness on this subject. The evidence of R. P. Sanders, an Indian interpreter, shows that he went on an expedition with Mr. Geo. R. Freeman to procure, if possible, some such evidence in behalf of the State (QQ. 48, 50). The expedition does not seem to have been fruitful, but some of the same Indians visited by Mr. Freeman were examined in behalf of the United States, and the facts elicited from them exhibit the wisdom of Mr. Freeman's precaution in offering no Indian evidence to sustain his cause.

A brief synopsis of the knowledge of the Indians as to the nomenclature of these streams is presented as follows:

Tar Poney, *alias* Heart Beat, a Comanche, between 50 and 60 years old; has heard the Main Red River from "below the mouth of Big Wichita clean on up the river" called Pia Pasa Hono "ever since I was a little boy, just beginning to hear and understand what other people were talking about." He knows the North Fork as "Mobetai Hono," and says it empties into Pia Pasa Hono.

Black Horse, or Toke-Mah; his oldest grandchild is 10 years old; identifies the North Fork as Walnut Creek or River—Moveti Honope—and says it runs south to the Pia-

pasa Honope; that he has known the two streams by those names ever since he was a little boy. In cross-examination he says that he knows no stream by a name that means Red River in that direction; that the Indian name for Red River is "Ec Oque" (x-QQ. 2, 37); that when a small boy his father called the stream he had been speaking of Pia-pasa Honope (Ec Oque is the Canadian; x-QQ. 7, 8). When he was a boy Pease River was called Ecco Nurque Honope (x-Q. 12).

RISING SUN, *alias* TA-BA-YERCHEN, a Comanche, about 60 years old; has been from the head of South Fork as far as below the mouth of the Big Wichita, and as far back as he can remember it was called Pia Pasa Honope (QQ. 7–10). Mobetia Hono empties into Pia Pasa Hono. The Canadian is called Co Se Oqua, meaning reddish water. He does not understand any English (1st Rd. Q.).

SHOT-IN-THE-FOOT, *alias* NASTHOE, a Wichita chief, 57 years old, knows the river the Comanches call Pia Pasa Hono; the Wichita name is Kitch-i-cum; it means a wide river; the Wichitas call the North Fork Kah-het-sodias (QQ. 11, 13).

TA-WAK-O-NEE JIM, a Wichita chief, 51 years old, says the river the white people call Red River was called by the Wichitas the Kitch-i-kaw (QQ. 3, 4). He describes the North Fork, and says the Wichita name is Kah-het-sodias (QQ. 13, 29). (See diagram drawn by witness, p. 636, Record.)

CHE-WAH-STALK, *alias* ALWAYS ON-THE-WATCH, a Wichita, corroborates the last witness as to the North Fork being called Kah-het-sodias, and the South Fork Kitch-i-kaw (QQ. 7, 8); the Washita they call Hah-edo-kaht, and it empties into the Kitch-i-kaw (Q. 6).

CHADDLE-KAUNGKY, *alias* BLACK GOOSE, a Kiowa, 47 years of age, a judge of the Indian court, but testifying

through an interpreter in the Comanche language, says the Kiowa name for the Pia Pasi Hono is Pa-pau-edal, which means big sandy river (Q. 8); the river the Comanches call Mobetia Honovit is called by the Kiowas Po-hona-pau (Q. 12); the remarkable intelligence of this witness will be seen by a glance at the map with which he illustrated and explained to the notary his evidence.

The Pease River is plainly laid down on this map as the river which the Comanches call Tich-a-ha-qua-hono (Q. 19). The witness says that the mounds marked "A" represent prairie-dog hills or houses.

A better conception of this witness's testimony can be had by an examination of his map in connection with his own description of its various parts as follows:

"17th Q. I want you now, in the presence of the commissioner and stenographer taking your deposition, to point out on this paper what the different marks made by you mean, so that they can be identified with blue pencil in accordance with your statement.

"The witness here designated the space marked Pia-pasi-honovit (Comanche Pa-pau-edal) in two places and gave the names there written as the Kiowa and Comanche names respectively representing that part of the map. The counsel for the United States then pointed to the figure under which is written 'Doan's store,' and the witness gave that English name as his reply. Counsel for the United States then pointed to the figures and lines lying south and west of 'Doan's store' and the witness then said

"19th Q. What side of Greer county is this river you have called Pa-pau-edal?

"Ans. Pa-pau-edal is on the side that the Kiowas say Pi-a-coom, which is soft wind—warm wind in English. Greer county lays on the side which we call cold wind, and that means from the north.

"Note by the commissioner: The foregoing question and answer were elicited owing to a misapprehension between

counsel as to whether the witness had located the Pa-pau-edal on the south side of Greer county.

"Counsel for the United States then pointed to the figures and lines lying south and west of 'Doan's store,' and the witness then said The witness then said, pointing to the four figures marked with the letter 'A' and quoted the words 'mounds' and said: 'It means a little animal that comes up there out of the hole and sets up on his paws and makes a noise like Ti-ti ti. You find them kind of animals—they are a kind of red-yellow color; can't hardly describe them as to the color. They are very thick up and down there and have a great many houses and hills up and down there; that only represents a few of them. The Comanche name is Tich-a-ha-qua-hono. It is named from those little animals.'

"20th Q. Tich-a-ha-qua-hono—show me that on your map.

"The witness here pointed to the lines between which is written the words Tichi-ah-qua-hono.

"The witness next pointed out the stream called Ataway-taiti-pau; and the other figure marked 'Very large tree,' and said that that was a very large tree which stood there a very long while ago, that it took seven men to span around with outstretched arms; 'it has since burned down, I think.'

"The witness then pointed to the figure marked 'A turkey,' and the creek just above it is called Turkey Creek.

"The witness next pointed out the line marked Owl Creek and said: 'That is a little creek with very good water that empties into Pia-passi-honovit, and the Kiowas call it after this bird that goes in the night called an owl. That is the name of the creek—Owl Creek. The figure on the other side marked "owl" represents an owl.'

"The witness next pointed to the place marked 'Hills' and Great Falls and said: 'That represents the hills around there, and this is where Pia-passi-honovit comes from the hills where there are some great falls like those up here in the Washita near Mr. Fred's house. Mr. Goodnight has a ranch between Owl Creek and those hills (marked Goodnight's ranch). He had it a long time ago and it is still there.

"The witness then pointed out the place marked 'always water here' and said: 'From here up in this direction it is rocky and the river is as another river—not sandy like it is below. That country there has no other creeks in there at all; this is the only one. There is always water there; that is good water above. When I was a boy the Kiowas camped about there.'

"The witness next pointing to the irregular line on the west side of the map, indicated that that was the west edge of the staked plains and it was so marked, and between that and the place marked hills lies a very large prairie country there.

"The witness next located the spot marked 'Sweet's store' as the place where Mr. Sweet lived six years ago, which was the last time he was there.

"The witness next pointed to the line marked 'Texas cattle trail' and said: 'Leaving this Doan's store down here, the cattlemen drove across Red River and watered their stock in the Salt Fork and then came on out here on the prairie country until they reached North Fork and watered their cattle in the North Fork, and then some of them turned back and crossed where Cleveland then had a store. They crossed the North Fork and then there were several of those little mountains in there. This is a big mountain they call Wichita mountain. They followed up in this direction north along Elk Creek and watered in one prong of Elk Creek, and leaving that they drove north until they left our reservation. Here at 'C' is Lone Wolf's and other Kiowas up and down Elk. 'B' represents Cleveland's store.'

"The witness then described two points marked 'D' as mountains.

"He then pointed out Elm or Salt Creek and said: 'White man call it Elm Creek or Salt Creek; Kiowas call it O-tan-tai-pau.'

"Witness next pointed out the figure marked 'Navajoe m't'n' and the figure underneath marked 'Heaphouse—some stores' as indicating Navajoe Mountain and the town of that name near it, with two small figures to the right of Navajoe Mountain marked 'D,' which he calls mountains.

The figure marked 'E' witness described being the place which he saw when he came back from Medicine Lodge—some pickets set in the ground representing an old building or place for protection of horses supposed by him. No one ever lived there that he ever saw. That was after the treaty was completed at Medicine Lodge—the council. We then moved on this reservation and he saw this building. That is as near as he can count the winters. 'We count according to circumstances and events.' After that council he came here. That was no regular building that he knows of.

"Witness next described the places marked 'mountains' and 'small stream' on the upper right-hand corner of the map and said some Indians called that small stream 'Mountain Creek.' They had names for the large streams, but had no names generally for the small streams. I do not think the Comanches have any name for that small stream as they never lived there, but I think the Kiowas have a name. There was an old man who lived there a long while ago named Citim-quia."

Bull Wilson, *alias* Ka-she-co-que, a Delaware, an old man, describes the North Fork as being called Little Sand River by the Delawares (QQ. 9, 13); knows the Red River from the mouth of the Washita to the mouth of the Little Sand River (Q. 16); says the Delawares called it Red River as far as it went, ever since he was a little kid; that the Delaware name was Mah-ka-see-po (Q. 18).

John Wilson, a Caddo Indian, 54 years old, says the Caddos call Red River Big River; the Comanche name for it is Pia Passi Honovit; he knows it as far as the mouth of the Washita (QQ. 5, 7); that the Caddos called Red River "Bart-hi-migh" when he was small (Q. 16), meaning a large stream (Q. 14).

Dr. J. J. Sturm, a member of the Caddo tribe, and interpreter of Comanche language, says Mobetia Honovit means Walnut River; Pia Pasa Honovit, Big Sand River; the Comanches called Main Red River Pia Posa Honovit

not far from the Staked Plains to a point down below North Fork (QQ. 19, 22). They called one branch of Pease River Teacho Yah Honovit (Q. 25) and this is supported by C. F. Doan (p. 358, Record, Q. 34).

Pat. Dooling, 47 years old, came to Upper Red River about 1870; had heard the South Fork called Red River by the Mexicans for about 20 years, and never heard it called Prairie Dog River until the country commenced settling (x-QQ. 6, 8).

Dave McBride, 42 years old, lives in Deaf Smith county; has travelled all up and down both streams; the head of the South Fork is called Palo Duro canyon by people near the New Mexican border (Q. 5); says the old Comanche Indians called South Fork Pia Bashi Honi (Q. 17 and x-Q. 97).

I. L. Barnett says the Indians called the river by the same name from the mouth of Pease all the way up (Q. 9 and x-Q. 6). (See also J. R. Jowell, Q. 7).

Chas. Goodnight, age 57, known the country since 1847; in the cattle business since 1856; was in the State Rangers in 1862; was with Gov. Ross on Pease River in 1861; says the rangers called South Fork Main Red River and the other stream the North Fork; the Indians then called the North Fork something like Mobetie, and the town of that name in Wheeler county was supposed to be named after the Indian name of the North Fork (QQ. 11, 13); the Mexicans called North Fork Nueces, meaning nuts, walnuts or pecans—either.

It would be useless to occupy more time in a discussion of the Indian or any other names for either of these streams at a later period. The evidence shows that each has been called by various names, and it is submitted that the testimony respecting the name of either one or the other is unsatisfactory and inconclusive as establishing the identity of

either stream merely by its name at any period in the history of this controversy. A number of witnesses from Fragoso down bear evidence to the fact that streams were christened afresh by every new explorer, and a glance at any modern map of the Red River country when compared with Humboldt, Pike, Melish, Long, Cordova, Marcy, Pressler, and others will attest the correctness of this declaration. So far as the Indian testimony is concerned, it shows that the Indians, like Fragoso, called the main Red River by the same name both east and west of its confluence with the North Fork. The Indians are sustained substantially by the records of the Bureau of Ethnology.

James Mooney (pp. 316–17, Rec.), of the Smithsonian Institute, furnishes the following as the Kiowa Red River local names:

Main Red R. (above & below entrance of North fork)= Pe Pa‘ Edal = Great Sand river, or simply Pa‘ Edal.

North fork = { Pe Pa‘ = Sand river. or Otä^{n}tai Pa‘ = Salt river.

Salt fork = Ätekia‘te Pa‘ = Medicin- Man river.

Elm fork = Dämätanä Pa‘ = Star-girl river (Q. 11).

He gives the following as the Comanche names:

Main Red river = Pia‘-päshi Hony‘ = Big Sand river.

North fork = Movita Hony‘ = Walnut river (whence Mobeetie, in Wheeler Co.).

Salt fork = Di‘chi-yäkwi Hony‘ = Prairie Dog Crying river (Q. 12).

Gen. R. W. JOHNSTON says in answer to question 28 that in 1858 the Salt Fork was called South Fork, and Marcy admits that Elm Fork was the Salt Fork. (See map at p. 162, Record.) So it appears that Elm Fork of to-day was the South Fork known to the rangers in 1858.

This designation of Salt Fork seems to be in accord with the later recollections of Gen. Bee (p. 1221 and x-Q. 26), and in this connection we may again refer to Mr. Freeman's suggestion to Mr. Corner (p. 1379) as to Marcy's mistake in supposing he was at or near the mouth of North Fork when he referred to the bluffs which Mr. Corner did not find there, the evidence as to which mistake is made more apparent by the communication of Mr. Strain (p. 173) to the War Department, immediately on the publication of Marcy's report, calling attention to the fact that Mr. Marcy had mistaken the main Red River in calling it Ke-che-a-que-hono, and omitting Pease River, which *he* contended was the stream bearing that Indian name. (Also J. S. Ford, p. 1280.)

Gen. W. L. CABELL gives the following conclusive statement showing the utter unreliability as to the names of streams in this region:

"60 Q. Is it not a fact that the continual flow of water of which you speak in the North Fork is below one of its tributaries now known as Elm Creek?

"A. Yes, sir; there is a tributary there known as Salt Fork, as the Indians called it at that time. Marcy named his streams, like all the balance of the army officers, to suit himself, as he went on. The question is whether the next officer who came around changed them. Look at the names in the maps of the Chickasaw Nation, and you will find on Melish's map a dozen or more that will conflict with the names they are called now. I don't recollect the name of a single creek up in that country as they were then."

Simon Cockrell (x-Q. 27) says that in 1833 to '36 they did not know the names of streams, except Red River, Pease, and Prairie Dog River, but called them by names they gave them themselves.

Gen. R. W. Johnson (x-Q. 16) says "everything in that region that is not called something else is called one of the branches of Red River."

R. H. Burnett says that his commander, M. T. Johnson, in 1848 (QQ. 7, 10), called the South Fork Prairie Dog River, and the other stream he called North Fork (QQ. 12, 16, and x-QQ. 22, 23).

José Martinez says (QQ. 48–49) that the Mexicans, in 1858, called Main Red River Rio Colorado de Natchitoches (meaning North Fork), and they called Prairie Dog River Rio las Peros, which means the River of the Dogs (Q. 64), but old Dr. Sturm was along and he always called the stream North Fork, which is now known as such (Q. 70). Some call Prairie Dog River South Fork (QQ. 80–81); has heard the Comanches call Red River by the name Piapassahono from where all the streams come together down, and has heard them call Prairie Dog River something like "Parwasup" (QQ. 90–91).

T. F. Roberts (Q. 11) says that in 1840 a half Indian guide named Jack Ivey called South Fork Prairie Dog River; called Pease River Plum River, and North Fork Main Red River; that from 1862–'65 he scouted all over that country in command of a company, mostly young men; that they called the South Fork Prairie Dog River, and the North Fork Red River (Q. 19); that in 1836 as far west up Red River as any white people lived was regarded as being in Arkansas, and they paid taxes as citizens of Miller county, Arkansas (x-QQ. 1–3, and Rd. Q. 12).

An inspection of the cross-examination of this witness leads to the conclusion that he is mistaken as to the streams

he referred to in his direct testimony, or otherwise he has forgotten everything about the locality except the names of the rivers in controversy. He saw no mountains, but some high hills on both sides of the river, probably as much as 100 feet high. They were all along the river on both sides. His camp was only ten miles from the junction of North and South Fork, according to his statement (x-Q. 38). The North Fork at this point runs a little west of south, so that, if on that stream, he must have been on the east or west side of it. Still he says that as to the stream he is talking about, his camp, ten miles from the mouth, was on the south side of the north prong.

J. T. Todd, the county judge of Greer county, never heard of Ke-che-a-que-hono in connection with South Fork of Red River (Q. 13), though he thinks he has heard of a similar name (Q. 11).

J. C. Settles (x-Q. 61) says that in 17 years the names of a great many creeks have been changed.

Solon A. Loving; 69 years old; in Texas since 1844; on the frontier with cattle from 1856 to '60; says (Q. 4): "I was acquainted with the river from the forks down to the mouth. They called them *the forks* of Red River." This witness lives in Montague county, but does not know whether the Washita empties into Red River or the Mississippi (x-Q. 6). Though Mr. Freeman visited him a few months before testifying, he had not refreshed his memory as to the events and localities he was familiar with forty years ago (x-QQ. 8–15), but he has furnished names of witnesses to testify. Old scouts and rangers called them the forks (x-Q. 26). "The commander of the company said we would come upon the Indians either on the Prairie Dog Fork or the Red River Fork above the forks" (x-Q. 28). They were the forks of Red River (x-QQ. 29, 37).

All the above five witnesses were examined for the defence.

The Santa Fé Trail.

One of the contentions for the recognition of the North Fork as the boundary stream is the allegation contained in the answer to complainant's bill, that the Spanish government upon taking possession of Natchitoches and the territory lying on or adjacent to "Rio Roxo" established and laid out a road or route between Santa Fé, in New Mexico, and Natchitoches, now in the State of Louisiana, for the uses of commerce between said places, which road or route traversed the country west and northwest of Natchitoches, along the south bank of said Rio Roxo to a point now in ——— county, Texas, then across said stream to its north bank, and thence along said north bank to the source of what complainant now styles the North Fork of Red River, and thence to Santa Fé" (p. 14, Rec.).

It is alleged in the pleadings that at the date of the treaty of 1819 this stream, "from its mouth to its source, was well known to the Spaniards, as well as to the Indians and trappers of that region of the country, as the stream now called Red River, having its source near the source of the Canadian River, *southeast* of and near to Santa Fé, in the now Territory of New Mexico."

The facts proven are as follows:

1st. At the date of the treaty it was believed by the Spaniards that the Rio Roxo had its source 45 miles *northeast* of Santa Fé, and so appeared on all maps up to that date.

2d. We have shown that the Canadian River was, in their ignorance of the interior country, supposed to be the head and source of the Red River, with whose waters near the Mississippi they had some accurate knowledge.

3d. This alleged Santa Fé trail is not shown upon the treaty map at all.

4th. It appears in Melish's map of 1823 as starting from Santa Fé, going a little south of east on the north side of the Canadian River, crossing that stream at 100° 30′ west longitude; thence southeast, crossing the head of south fork of the Canadian, across the False Washita, down to Rio Roxo, or Red River, just skirting a small portion of the stream which we contend represents the North Fork of Red River, but which Mr. Melish does not lay down as the Red River or give any other name.

5th. No map has been produced upon which this alleged Spanish road appears, which shows it anywhere near the head and following the course of the North Fork of Red River, or as passing through any part of Greer.

6th. The meridian was supposed to be 65 miles east of where this trail strikes Red River near the forks.

7th. It is doubtful if there ever was a trail leading from Santa Fé to Natchitoches which went near North Fork; but if true, the depositions in this cause do not trace it so as to show where it crossed Red River below the forks or where it struck the North Fork of Red River, if at all. Indeed, the counsel refer to it as crossing "in ——— county, Texas," and had to wait for future discoveries to give its crossing a traditional location.

We shall see from a review of the evidence in regard to the Santa Fé trail that parts of old Indian trails, military routes, exploring expeditions, peace commission routes, and almost every travelled way have been identified as parts of this hidden path, while its alleged crossings upon the main stream are as numerous as the tributaries thereof.

We have no historical reference to rely upon; no legacy from trappers or traders who traversed it; the pioneers of civilization do not seem to have possessed any light in regard to it, and the boundary commission of 1886 had not discovered the mass of modern evidence in that regard which has been introduced in this cause.

Simon N. Cockrell, 93 years old, started from Fort Smith, Ark., and claims to have struck Red River in 1833, between the mouth of Pease and Prairie Dog River (Q. 4), about a mile below the mouth of the latter, and remained there until 1836 (QQ. 5, 6, 13). He must have crossed North Fork to reach that point, but does not mention the fact; he says they travelled an old road (Q. 15); that he afterwards heard of some roads from Nacogdoches and Natchitoches, and the last-mentioned road "they all said ran up Red River and went to Santa Fé" (Q. 16). We next find this witness 75 miles above the mouth of Dog River and on the northeast side of Red River, where he found a canyon or gulch "with water in it and a cave all around from one end to the other" which was a Kiowa village when they were in it (QQ. 21, 23). Counsel for the State sought to lead this witness to his description of this remarkable place, as will be seen by the following extract:

"Q. 24. Was there or was there not a valley where the water was?

"(Question objected to by U. S. counsel as being leading.

"Question withdrawn by counsel for the defendant.)

"Q. 25. Describe the surface of the ground about the water that you have mentioned in respect to height and low places, if there were any?

"Ans. Between the head of the water and the mouth of the cave or gulch there was only about twenty-five steps of ground in width each side of the water, and then it was a 150 yards or more to the head of the water, and the cave extended all around the water, and the water ran off from there into a beautiful valley between there and the river; the road continued on up the river past that pretty valley, which went to Santa Fé, they said."

Right at this point the witness found what he calls "the same road that I before mentioned" (Q. 27). He says it crossed the road from Fort Smith to El Paso, then crossed the river and went by a place called St. Jo, in Montague county, but does not say where it crossed the river between these two points, nearly 200 miles apart (QQ. 27–28). The proof positive that this witness is not testifying to the locality now in controversy is found in the fact that he testifies that the same old road comes through Archer county, in which he lives, and that "the Oklahoma men now moving from here have made a road between the two mountain peaks on the northeast side of his supposed Red River" (QQ. 34–37). He further describes his locality as on a stream where they *used a boat* (Q. 38). What stream above the Washita ever furnished enough water, except for a few days after rains, where the smallest boat would be available? And this is the description he gives of its location:

"Ans. The creek ran about three miles, probably more, east of the fort, and ran into the river four miles below. The land is very level except a spot right at the creek, a mound, covered with timber and brush, and Red River at the fort changes its course a little and runs south, or nearly south, and then makes a short turn and runs east to the mouth of the creek, and then changes and runs nearly south.

"Q. 38. For several miles above the mouth of the creek, how does it run in reference to the river? Does it run directly towards the river or does it run parallel with the river for several miles before it empties into the river.

"Ans. I call it parallel.

"Q. 39. How long is that creek according to your recollection, and how near the mountains does it head?

"Ans. I could not tell you how long it is; I would suppose some miles from the mouth of the head. It has two forks and they straddle the mountain. The right-hand prong runs right past it on the east side, and heads in the moun-

tains the other side of it. The other fork heads in the prairie on the west side."

This cannot be Otter Creek, for it is only three or four miles east of the confluence of North and South Forks, and the description which the witness gives in his succeeding testimony shows that he is talking about an entirely different region to the rough and rugged country which counsel sought to have him describe in reply to the three questions following:

"Q. 40. Now, between the head of that creek and the Kiowa village that you have mentioned, what kind of country is it? Is it rugged and rough, or is it smooth prairie?

"A. It is tolerable level land according to my recollection.

"Q. 41. A little while ago, in conversation, while taking this deposition, you spoke of a very rough and rugged country northeast of the river. Where was that in reference to the Kiowa village?

"Ans. It would be nearly east or south of east and runs northwest.

"Q. 42. Beginning at the peaks, between the forks of the creek, that you have just been talking about, how far does the rough and rugged country extend, and in what direction according to your recollection?

"Ans. The beginning of it is south of east and runs a northwest course, as near as I can recollect, farther than I went."

The evidence that this centenarian witness has lost his bearings and is now travelling in dreamland is further apparent when he says they built boats "for the purpose of carrying off fur and buffalo-hides" (Q. 49). What a blessing such a stream would be to the 50,000 residents of Greer and the adjoining territory now.

But the witness also found a sheep-ranch 75 miles northwest of his fort, occupied by a Mexican boy of 18 whose

parents had been killed by the Comanches, but who himself seems to have been permitted by the savage red man to pursue unmolested his pastoral occupation (Q. 44). He furnishes approximately the date at which this old road was made when he says, "We had a guide with us who was an old man and I have heard him say that he knew when those ruts were made" (Q. 46). In the same answer he says that the Fort Smith road he travelled crossed Prairie Dog River probably *half a mile above their fort*, which would be half a mile from the forks, and the Natchitoches or Santa Fé road "turned to the right and intercepted the road coming from Nacogdoches three quarters to a mile above our fort," which would make the crossing within a quarter of a mile of the confluence of the two streams. He does not claim to have known at that time in regard to these roads, for he says in answer to question 16, "I did not know about those roads until afterwards, but everybody said they went to those places; the roads were there when I went there." Now see the commencement of his cross-examination, as to the direction from his present residence of the country he is talking about. He further says in cross-examination that he followed this same old road nearly three miles south of east from St. Jo, in Montague county, 25 or 30 miles from Red River, and that it was running about south of east from that point where he left it (x-QQ. 5, 9); the widest wheel-tracks were about like our common wagons (x-Q. 11); at the Kiowa village the Indians had between 80 and 100 acres of land in cultivation, fenced in with lariats (x-Q. 13). Catlin's map of Indian locations shows the Kiowa villages in 1833 as on the borders of the Rocky Mountains, south of Santa Fé. In his re-examination it was sought to explain some of his obscurities in regard to these streams, and he answers by asking counsel if there is not a river between Pease River and Dog River,

while in an effort to show the familiarity of the witness with the Santa Fé trail from his fort down to St. Jo. he admits that he never saw that road between the two points named at any time; and in re-cross-examination he thinks the Prairie Dog River went more to the northwest than Red River and does not know which is the widest stream.

Surely but little weight can attach to this evidence for any purpose whatever, for it is an utter immpossibility for any man to have seen the two streams in controversy without observing the disparity between them in width, and utterly inconsistent with a knowledge of either of them for a man to have been located 75 miles above the mouth of North Fork and imagine that the South Fork ran more to the northwest than the stream he was on.

There are two points in the evidence of this witness, however, which lead to the light of truth: First, he was located upon a navigable stream, and, second, he was engaged in the service of a man named Coffee, who was an Indian trader (Q. 6). The Washita is just such a stream as would furnish navigation for rude mercantile crafts, such as were required to transport the furs and hides. Coffee's trading house was located on Red River, upon the south side, very near the mouth of the Washita. This location will be found upon the map of 1844, by W. H. Emory, prepared under the direction of Col. Abert; and if these two facts are established, then the witness Cockrell is more "at sea" in his testimony than he was when paddling his canoe upon the Washita.

Col. Dodge's itinerary says that in 1834 a party of 80 men went to establish the first trading fort in that region.

Gen. H. P. Bee, age 71, who was secretary of the joint boundary commission which ran the eastern boundary of Texas in 1839, says that in 1843 he was with Col. J. E. Eldridge making treaties with Indian tribes; that they en-

countered the trail of the Santa Fé expedition which left Austin in 1841; followed the trail many miles; but in his answer to the 30th cross-question he says as to this trail, "it did not cross Red River, but mistaking the Wichita for that stream pursued their way; after crossing Red River at the mouth of Cache Creek and during my sojourn north of that river I saw no trail that I have any remembrance of."

The evidence of Gen. Bee is borne out by the map of J. H. Clark, published with his report of the proceedings of the boundary commission in 1859, showing the route of the Santa Fé expeditions of 1841–'42, neither of which touched the North Fork of Red River, but passed to the west of its headwaters.

Gen. Bee does say that he was told by Jim Shaw, an Indian interpreter, that he could have guided them through a road that would have taken them direct to Santa Fé, but there is no word uttered as to the location of that road (Q. 17). This was probably the route of the Chihuahua traders and did not go across Red River. (See maps.) He also says "that that country at that time was entirely uninhabited except by Indians" (Q. 17).

Col. Jno. S. Ford "heard at an early day that there was a road running from Natchitoches to Santa Fé, and saw traces of a road on Red River in 1858, said to have been parts of the same road, but can't state on what part of the river; they were in the vicinity of the North Fork (Q. 31, 33); does not remember which side of the river it was (x-Q. 28); did not see any growth in the road-bed except grass" (x-Q. 34).

J. W. Wilson has lived in the Chickasaw nation and "saw there what was called by the Indians the Santa Fé trail. It was on the east side of the Washita River" (Q. 20).

Solon A. Loving, age 69, in Texas since 1844; saw the

Santa Fé trail near where Gainesville is, Spanish Fort, near Red River, near the mouth of Salt Creek and about two miles from the mouth of Little Wichita; thinks it runs near where Wichita Falls is, and then runs on its course *due north from that place* (Q. 7). It seemed not to have been travelled in several years, and "nobody but a wild Texan would have noticed it had been a road" (QQ. 10, 11). This old trail crossed Red River near Wichita Falls, not far from Salt Creek, the second creek above Spanish Fort (x-QQ. 47–8); on the witness's attention being called by counsel for the State to the foregoing testimony he corrected, and said, "I meant that the road crossed Salt Creek" (Q. 49). He then follows the old trail across Big Wichita near where Wichita Falls is, the road going north of west; traced it 20 miles further, and then fell in on Red River and left it (x-QQ. 50–57); he never saw this road east of Gainesville, and does not know where it runs to (x-QQ. 67–69).

Richard Boren, age 68, came to Texas in '35; does not know where he was born; in 1855 saw the old road called Santa Fé road, but heard his father speak of it when he was about 12 (QQ. 12–14); when about 14 years old a party of Chihuahua traders stayed about two months near his father's house; when they left, went right up Red River (Q. 17). From his knowledge road would cross Salt Creek about a mile from its mouth (Q. 30); it crosses Belknap Creek about three-fourths of a mile from his present residence in Montague county (Q. 33); says that just after the war he saw mesquite bushes as large as the stovepipe in the room growing in the middle of the old road, and supposed the road to be 100 years old (x-QQ. 33-34); only the track of one cart-wheel on each side of the tree (x-QQ. 38–39); never heard of any traders on that road before or since those he saw when a boy (x-Q. 45); they were riding mules;

never saw the road more than three miles from Red River (x-Q. 53). (See exhibit filed with deposition.)

Prof. W. F. CUMMINS, geologist, never saw any evidence of any old trail on the North Fork, but saw one up the Canadian River, on the south side, generally known as the Fort Smith and Santa Fé trail (x-QQ. 100–101). This witness says:

"It would be very difficult to determine in a general way whether there was an old trail or not, on account of a large amount of sand drifted in by the winds, and it would only be at particular localities where such a trail could be seen. I attempted, in 1885, to follow the route—to retrace the route—followed by Marcy with his outfit in 1852, and found it impossible to do so by following his wagon trail" (x-Q. 106).

THOS. F. ROBERTS knew an old road in 1836, which ran up and down Red River, called "Natchitoches and Santa Fé trail;" saw it in Fannin and Lamar counties; the signs of travel were both fresh and old (QQ. 5–8). In 1849 went with Marcy from El Paso across the plains; on striking the Brazos River the Indian guide said there was an old road on Red River that he could go to from there, which led to his home at Santa Fé (Q. 9). (This may have referred to the Rio Colorado.)

In cross-examination the witness says that on down grade the road was washed; changes were made in the road so as to cross creeks, and the timber, where it crossed over roots, was left bare—the bark worn off; it was mostly traveled by explorers of the country, prospectors with the view of settling; no growth in the old road, except where there had been washes and it had been discontinued, at which places brush and saplings had grown up on the side. The road was beaten out smooth where there were no washes, and the horses and people who traveled it kept the grass cut down

(x-QQ. 16–20). The growth in these washes indicated about ten years' disuse (x-QQ. 22–29).

Gen. N. B. PEARCE was with Capt. Marcy in 1854; struck an old road whose general direction was up Red River; wagon tracks were several feet deep in places; this was through the upper cross timbers for about ten or twelve miles (QQ. 8, 9, x-Q. 6). Capt. Marcy mentioned this as being the old wagon road, and witness has "a kind of recollection that Marcy mentioned it as being Stephens' route to New Mexico shortly after the close of the Mexican war" (x-QQ. 10, 11).

T. K. CARMACK in 1849, in a company of 80 persons, saw an old trail said by the men to be the old Santa Fé trail; it was on Red River, below the forks (Q. 15); were out about six weeks; some of the party captured by Indians; the road went to Red River, in plain view of Wichita Mountains (QQ. 12–14). From the direction the road was going when he left it it would have crossed the river to the east of Gainesville, either in Montague or Wilbarger counties, he thinks (QQ. 23-24); the road was worn down a good deal, and in places covered over with grass—mesquite grass (QQ. 27–30).

MARTIN H. RAGSDALE knew of two Mexican trails from Santa Fé to Natchitoches, one 30 miles from Red River, the other through the timber country near the Red River; this was in Red River county (QQ. 11–16); saw a company of Mexicans on this road when he was ten years old, in 1824; they came two or three times a year (QQ. 22–24); the roads looked to be ancient then (Q. 25). This witness has been hunting about twelve years for eleven mule-loads of gold bullion said to be deposited near the river by Mexican and French traders who were all killed by Indians except three. Witness claimed to have a diagram of the place where the money was hid (Q. 20). His other occupa-

tion is retailing Ragsdale's Rheumatic Liniment and Hindoo Oil, a cure for pneumonia without prostration (x-Q. 1). First saw the river road when five years old (x-Q. 16); was on the road for thirty miles when twenty-five years old (x-Q. 19); saw the other road when sixteen years old, but did not travel it (x-Q. 20). In 1837 went ten or twelve miles west of Paris along the road that comes in from the east and went on further west; it was just an emigrant road (x-Q. 25); went on the other road in 1841 from Paris to Bonham; it was just the general traveled road for the country (x-Q. 29). The massacre and buried treasure was about 1816 (x-Q. 38), yet he never heard of it until 1866, fifty years afterwards (x-QQ. 39–44).

He never saw any washouts along the old road near Red River, as it was a level country (x-Q. 62). He learned that it was the Santa Fé road from a man who is dead (r. d. q. 7).

J. M. Fort knew the road from Fulton which intersected the Santa Fé or river route some 12 or 15 miles from the Fulton crossing (QQ. 4–10). (See Abert and Emory map of 1844.) This witness has practised medicine in Paris and Lamar county fifteen years (x-Q. 3); has travelled from Paris to Red River (Q. 4); never heard of the Santa Fé road mentioned as running through Lamar county until now, in reading the testimony in this case within the last few days (x-QQ. 9–10); nor did he ever hear of or see an old Santa Fé trail farther south, such as described by the witness Ragsdale (x-QQ. 11-12).

M. W. Hudson describes an old road, but "don't know where it begins nor where it ends. It crosses Red River somewhere between Pease River and the mouth of Wichita."

"From the mouth of Pease River it comes northwest toward Otter Creek and strikes the creek about 8 or 10

miles from its mouth. I cannot speak of it beyond Otter Creek.

"4 Q. Please describe that old road as near as you can.

"A. It is a road that looks to be used a good long time ago. It is a very old road from its looks. I don't know that I can describe it any better, but there are places where the grass has grown over the road; still there is a little signs of the old road being there, and it shows more in sand hills than in mesquite flats.

"5 Q. Do you know what the reputed name of that old road is?

"A. No; only from hearsay. I have heard what the name was, but can't swear that is the correct name.

"6 Q. State the name by which you have heard it called.

"A. The old Government trail. It is supposed to be an old Government trail."

It has mesquite grass, and probably a few mesquite trees near it in places (Q. 7). This name of Government trail did not suit the counsel, and the pursuit of information from this witness was dropped. In re-direct examination (Q. 2) the witness says this old road would strike Red River about 45 miles from Pease River, and that he had followed it 20 or 25 miles.

Another witness called by the State of Texas, but not questioned as to the old road the last witness testified to as going up North Fork some 25 miles, was—

J. E. Shipe, who has lived in Greer county for five years, right on the North Fork, between Otter and Elm Creeks (x-QQ. 1–5); identifies the same old road referred to by Hudson; has crossed it several times from 5 to 20 miles above Otter Creek, and says some call it the Government road, and some call it the cow trail (x-QQ. 6–9); thinks the road is 25 or 30 years old, from the washouts, ditches, and trees; new trees sprouted up from the roots of stumps; road overgrown with grass in places; appears more like a

wagon road than a cow trail (Rd. QQ. 3–11); says the old trail running above Otter Creek was from 25 to 10 miles from the river, and running a good road to Anadarko (Rd. QQ. 17, 19).

R. H. BURNETT says in the fall of 1848, when in M. T. Johnson's company, they struck the old Spanish trail near Spanish fort, and travelling up Red River traced it near the mouth of Pease River and never saw it afterwards (QQ. 7, 9). He had seen it prior to 1840, but that was the first time he knew what the road was called; it looked like a wagon road that had been used some time, and they still used it as long as they were there, and were travelling on it in the fall of 1848 (QQ. 17, 19). Could this be the same road that Roberts thought had not been used for 10 years before 1836?

JOSE MARTINEZ, in 1858, struck the old road close to Otter Creek and followed the course of it a mile or two at a time (QQ. 21, 24); it crosses Otter Creek four or five miles below the Narrows (QQ. 27, 32). It appeared to be a very old road (Q. 34); noticed several trees on the road—pretty good size trees; could not tell the size—never paid much attention to them (QQ. 37–39). It goes up Otter towards the Narrows some distance, then through the mountains, turns northwest, extends across Tepee Creek to the mouth of Devil's canyon, and from there leads out to Comanche Springs (Q. 40); followed the same old trail from the head of the Washita down the stream (QQ. 41–42); Mexicans along with him called it the Santa Fé route, and said it was made by Mexicans who were mining in these mountains; the Mexicans from Natchitoches came up this way, and the New Mexicans came down this way (QQ. 45–47). This old trail goes right up North Fork of Red River, crosses it at Comanche Springs and then crosses again about Sweet Water, about 75 or 80 miles further up;

never saw it there though, but was told by hunters about a crossing up there (QQ. 95–98); he "never seen no road" up and down Prairie Dog River; no sign of a road, though he has hunted up and down (QQ. 99–101).

WILLIAM ISH, 38 years old, who went with Mr. Freeman in 1893, was guided by Mr. Stinson, says he knows a very old trail or wagon road leading down Otter Creek; crosses the mountains just west from the Narrows (Q. 50); mesquite trees in the middle of road six to twelve inches in diameter; followed this road for five miles; drove on it for several miles in a swift trot (QQ. 50–52); where it crossed gulleys or branches ruts of wagon wheels showed plainly where they went down the ravine (Q. 57); no evidences of travel on the road now (QQ. 68, 69); judged the trees in the road to be fifty or seventy-five years old, and that 25 or 50 years may have elapsed after travel had ceased before these trees sprung up.

GEO. W. BRIGGS knows the old road called Santa Fé trail, and thus describes its location and course:

"A. Commencing at the south end as far as I know, at a point on Red River about six miles below the junction of Pease River, it runs north from there, and crosses the North Fork of Red River at the mouth of Otter Creek, passes through a portion of Greer county, and passes out of Greer into the Kiowa country, and continues north about eighteen miles, and turns in a westerly direction and passes up between Elk Creek and the North Fork of Red River, right along the divide, and passes about eighteen or twenty miles north of Mobeetie, in Wheeler county. That is as far as I ever followed the trail; that I have been all along that distance.

"27 Q. At what point does Pease River enter into Red River? How far below the junction of North and South Forks?

"A. About twelve miles" (QQ. 24–27).

Says Otter Creek makes a junction with South Fork (Q. 29). The trail runs straight through Greer county, passing the foot of Navajoe Mountain on the west side (Q. 32); 17 miles from mouth of Otter to where the trail crosses North Fork again into the Territory (Q. 31). Quanah Parker told him it was the old trail that went into Mexico and Texas; he did not know where, and did not call it the Santa Fé trail (x-Q. 31). To follow the river from the mouth of Otter to where the trail crosses North Fork would be 35 miles or more (x-Q. 33).

J. T. POLLARD, speaking of this Santa Fé trail, says in answer to Q. 66 and following:

"A. When I was a boy in Hopkins county it came through Titus county. Every one—we all knew of the trail; it was called the Nachitoches and Santa Fé trail, and it came up on through Montague county. I have seen traces of it there and I have seen traces of it in this county.

"67 Q. Where did it cross Red River?

"A. It crossed a little above the mouth; *a little above where the North and South Fork come together;* then it came up on the west side of the North Fork some twenty or thirty miles, you might say; I do not know exactly, and it then crossed over on the Nation side and it kept up the stream out on the hills.

"68 Q. What stream?

"A. The North Fork; it kept up the North Fork; sometimes close to it and sometimes further away. It was never very close to it; it kept out on the level prairie; there were some graves up there.

"69 Q. Trace that trail out that you speak of until you come to those graves.

"A. It is plain and can be seen to-day on the top of Cedar Top Mountain; it is plain to-day where it goes over the gravelly point."

Never followed it beyond Cedar Top, which is about 24 or 25 miles northeast of Mangum.

W. E. GATES says of this same trail in answer to Q. 15:

"A. I do not know that but a short distance. The old Santa Fé trail crosses Otter Creek about six miles from the mouth of Otter, passing up there by the Granite Mountain and it goes out a gap in the mountain, close to the place that we call the Narrows on Otter Creek; thence northwest up Elk and on up in the mountains to Elm, and I have not travelled it any further than that. At an early day the trail was very plain and we would find those old iron-pointed bands for wagons with slots cut in them where they held fish-linked pins. We found them on the trail there. The old trail is on Otter Creek 6 miles east of North Fork, and crosses North Fork above Elm (QQ. 19–20); says it was called the Spanish or Mexican trail." (Q. 22.)

JNO. P. SMITH lived in Texas 40 years; was deputy surveyor for Young land district in 1858–'9; no white settlements there then; visited Camp Radziminski on Otter Creek the same year. In 1860 accompanied Col. M. T. Johnson of the Texas rangers, and camped on Otter Creek (QQ. 2–6). In August, 1860, went north following "*an old trail that was made by Maj. Merrell in* 1856 (see map, p. 172) until we crossed Elk Creek, on the east side of Red River. We then turned west and crossed Red River, and camped at some springs two or three miles, probably a little further, from Mt. Webster, the extreme western peak in the Wichita Mountains." Col. Johnson with the main body went north towards the Canadian. My captain (Johnson), his son, and I, the lieutenant, with supply wagons of provisions and ammunition, went west from Mt. Webster, struck Salt Fork of Red River (Marcy's Salt Fork) some 10 or 15 miles from Mt. Webster, and followed that up about 75 miles from Red River and Basin Springs in a westerly direction and camped there till October. Had a Mexican named Juan Torres as guide. Dr. Swin-

dells, the surveyor, was with them; followed the Salt Fork into the plains (Q. 14). Capt. Johnson made two or three trips north as far "as the waters of the Canadian where they cross the Red River;" reached Mt. Webster by following the Merrell trail until they reached Elk Creek, then crossed Red River. Thinks trail named by Maj. Merrell, of U. S. Army (Q. 19). Witness met Marcy at Belknap, about 90 miles south of Red River, and east of the forks (x-Q. 1); describes the Merrell or Murel trail in his cross-examination as follows:

"48 C. You have spoken of the Murel trail. Please describe as definitely as you can the location and course of that trail.

"A. He moved a body of U. S. troops from Fort Belknap in 1856 (Belknap in Young county) north across Red River some distance below the mouth of Pease River, and followed on up, crossing Otter Creek and Elk Creek, and up by Antelope Buttes, on the Canadian River. I never followed it any further beyond Elk Creek, but it was the understanding that he passed Antelope Buttes and *Red River*. With that trail from Elk Creek down to Belknap I was very familiar, because I used to travel it occasionally.

"49 C. From the description you have given of that trail, would it not pass near to the North Fork of the Red River for nearly three-fourths of its length?

"A. No; it does from Otter Creek until it passes Elk Creek, but from there on it would not be exceeding thirty miles, and from Belknap to the Canadian would be over two hundred miles—seven counties.

"50 C. The trail, then, extends in your knowledge something over two hundred miles?

"A. Yes, sir.

"51 C. Beyond that point you have never seen it?

"A. No, sir.

"52 C. And its general direction after crossing Red River below the forks is a little east of the forks of the river?

"A. Yes, sir.

"53 C. When was that trail first established?

"A. In 1856.

"54 C. And it was used for transporting troops and supplies?

"A. Only from Texas up to Radziminski, and finally Ft. Cobb. It was used for the transportation of troops when there was trouble up there in 1856.

"55 C. Was it a wagon trail?

"A. A great many wagons went over it—military wagons.

* * * * * * *

"59 C. Did you ever see any other trail than the one you have referred to during your location there?

"A. Nothing parallel with that. There was a trail subsequently made from hauling supplies towards Gainesville, and that was changed in 1861 so as to cross Red River further down.

* * * * * * *

"62 C. Did you ever see any evidences during your location in that territory of any old Spanish trail?

"A. I did not, individually.

"63 C. Did you have any information at that time as to the location of the Spanish trail from Santa Fé, N. M., running through the Red River country?

"A. None, except there were some Spanish villages—Taos—up on the Canadian River, near Pecos, which had been reached by people going up the Canadian, but I do not know where they struck the Canadian. When I was up there with the army there was nobody to inquire or learn anything from. This man Torres was the only man who had any information about the country, and he seemed to know it entirely from one point of the territory to another; but I never inquired of him about such things."

Gen. R. W. JOHNSON testifies (x-QQ. 7–10) to this same road from Fort Belknap to Radziminski. He was at Belknap when it was organized, and does not remember ever crossing any other wagon road in that vicinity.

J. H. SWINDELLS, district surveyor of Young land district, corroborates the witness J. P. Smith as to the trail

made by Capt. Johnson; says there were 800 or 900 men, cavalry, in the expedition, and Capt. Johnson camped near what is now known as Clarendon (QQ. 10–11); but neither he nor any other old surveyor testifies to any Santa Fé trail in that region of country; nor does old Mr. Sweet, the first settler in Greer; nor Mr. Tittle, who had run cattle in Greer county since 1880; nor Gen. Cabell, whose military life for years furnished a knowledge of the country and made him particularly interested in the location of all routes of travel in that country.

We might stop right here with confidence in the position that the respondent's own testimony utterly fails to identify any road bordering on the North Fork of Red River as identical with any portion of the alleged old trail between Santa Fé and Natchitoches; and the testimony is almost equally doubtful as to most of the evidences of travel bordering the south side of the lower waters of Red River. J. W. Wilson saw this trail on the east side of the Washita; the Carey-Lea atlas of 1822, Melish map of 1823, and all the earlier evidences of such a trail locate the point of its crossing Red River at the mouth of the Washita, 150 miles east of the forks, and it is a fair assumption that these delineations of locality are more reliable than the unsubstantial gleanings of witnesses like Cockrell, Loving, Boren, and other early settlers, whose opportunities of information were so meagre, and who, when crossing a wagon road at one point said to be this old trail, seemed to imagine they were upon it wherever they struck a wagon trail, at no matter how remote a distance. If these maps are correct, then the road described by the witnesses as on the south side of Red River, crossing the Big and Little Wichita and Pease, thence running close to the mouth of North Fork, was unknown 75 years ago. If the stream north of Red River, which this old road strikes some distance west of the Wa-

shita, is the North Fork of Red River, as we contend, then both Melish and Carey and Lea, beyond the peradventure of a doubt, lay down the Prairie Dog River as the main stream, and all subsequent map-makers do likewise; and this North Fork, being an unnamed tributary of the principal stream which *was* named, was clearly not regarded as the Red River at or about the date of the treaty. If, on the other hand, the stream south of the one along which the road skirts for a short distance is the North Fork, as claimed by the defence, and the South Fork is not laid down on the maps prior to Marcy's, then the Santa Fé trail did not touch North Fork of Red River at all.

Indeed, the State of Texas furnished an expert witness who utterly discountenances the idea of identifying such a trail at this date. Prof. Cummins tried in 1885 to trace Marcy's route of 1852, and found it "impossible, on account of a large amount of sand drifted in by the winds," to follow his wagon trail. It is true that Mr. Burnett says the old road was still travelled in 1848, but he cannot be talking about the same road which the witness Wm. Ish says had apparently not been travelled for a period of 100 to 125 years when he saw it. Ten or twelve miles of this road traversed by Gen. Pearce was probably, according to Marcy, part of a military route made shortly after the Mexican war. Carmack's old trail seems to have crossed Red River east of Gainesville, which is consistent with the location laid down on the maps. Mr. Hudson's trail crossed between the mouth of Pease and Wichita, and, instead of touching the North Fork at all, it went northwest to a point 8 or 10 miles above the mouth of Otter Creek; but he says they called it the Government trail. Mr. Shipe followed it 20 to 25 miles from Otter Creek and it ran towards Anadarko. Martinez found it crossing Otter Creek, four or five miles below the Narrows it passed through the

mountain, thence northwest to Devil's Canyon; he understood the road to have been made by Mexicans who were mining in the mountains. Briggs' old road crossed six miles below Pease, from there north to the mouth of Otter, then through Greer county. J. T. Pollard's Santa Fé trail crossed Red River a little above where the North and South Forks come together, and went on up the west side of the North Fork for 20 or 30 miles. J. C. Settles knows the Spanish trail which crossed the mouth of Pease River, and goes by Settles Creek in Greer county, which trail he followed 10 or 15 miles. This witness, not having been questioned on that subject, volunteered his testimony on this point in answer to the last general interrogatory by the notary. W. E. Gates identifies the Martinez trail, which goes up Otter Creek to the Narrows, then to Elk Creek and on up in the mountains; *it* crosses North Fork above Elm; but Jno. P. Smith, the surveyor, knows this old trail was made by Maj. Merrell in 1856.

Thus is made "confusion worse confounded" and identity destroyed through the efforts at identification. But the most convincing argument against the theory that the North Fork of Red River, in its relation to the so-called Santa Fé trail, has any bearing upon this controversy will be found in the failure rather than the effort to introduce the testimony which respondent had at her command. Neither Mr. Swindells, Mr. Smith, Mr. Kyle, Meers, Bogard, Prof. Cummins, nor Gov. Ross knows anything of any such trail. The first four were the official surveyors for Texas of that region of country, while Prof. Cummins had charge of the geological researches of northern Texas. He, with his expert eye, never saw any evidences of an old trail on North Fork. The two first named have both resided in Texas over 40 years; they are men of intelligence, character, and official importance; the former compiled a map of

the joint surveys of the two men, made before Greer was ever named as a county of the State. This map we called for twice and have failed to obtain. Neither of these witnesses, with their ripe experience, knows anything of such a trail anywhere near North Fork, but Mr. Smith (63d x-Q.) knew of such a trail "going up the Canadian." It is incredible that a matter of evidence deemed so important for the defence should be compelled to rest on the contradictory evidence just reviewed, if the fact contended for be capable of proof at all.

In lieu of ex-U. S. Senator Maxey, who has lived at Paris, Lamar county, nearly 36 years, we are presented with the eccentric Ragsdale to describe the history and traditions of the county. The experienced surveyors are either silent upon or refute the theory of the cow-boys. The generals and colonels whose names are linked with western civilization offer no word to sustain these modern historians. With about half a dozen ex-governors and a like number of ex-commissioners of the land office still in the land of the living, not one appears upon the record to sustain this contention. And, above all, the public records of the State of Texas—its surveys, histories, geographies, and military expeditions—either throw no light in elucidation of this part of the pleadings, or the failure to produce such testimony strongly suggests that it would weaken rather than strengthen the claim of the State.

Map Evidence.

The Carey and Lea atlas (1822) shows "great Spanish road to Red River" running from Sante Fé; crossing near Dry Fork of Canadian, South Fork of the Canadian, and crossing False Washita about 90 miles from its mouth, thence crossing Red River a few miles west of the mouth

of Washita. Melish's map of 1823 pursues a course identical with Carey & Lea. The Abert & Emory map of 1844 shows an old road on Red River starting from Fulton, 60 miles north of Natchitoches, which generally follows Red River on the south side until it passes through the cross timbers, with a branch running from Jonesboro through Clarksville. This road after passing through the cross timbers turns southwest, and is named "trail of the Chihuahua traders from Fulton in 1840." It delineates with remarkable coincidence the three Santa Fé routes described by the witness S. E. Stilwell; the route of Maj. Long down the Canadian in 1820; Pike's route in 1806; Gregg's Santa Fé route in 1839, and the old Pawnee village visited by Pike in 1806, located at about the 99° west longitude. Disturnel's map of 1846–'7 shows the same route from Fulton running south of Red River, but about 20 miles west of the mouth of the Washita, where it turns to the southwest. It is crossed by the expedition of 1841, from Austin to Santa Fé, which goes northwest and crosses Red River at about 102° west longitude, passing around the head of North Fork.

Marcy's map of 1852, from near the mouth of Otter, shows that crossing that stream he went up to Elk Creek, crossed Elk going in a northwest direction, crossed North Fork above Salt Fork or Elm, turned to the west, then northwest to North Fork again, which he crossed, and then pursued a course along North Fork to Sweetwater, and thence across to McClellan Creek.

It will be seen by a glance at this map and this route that all the locators in Greer county who have traced the Santa Fé trail from near the mouth of Otter, through Greer to Devil's Canyon, Sweetwater and McClellan Creeks have evidently been upon portions of this trail made by Marcy in 1852.

Other Trails.

As showing the probability that the trails which crossed Red River at any distance west of the Washita; those said to have been found near the head of Otter Creek, to have gone up or down that stream through the Narrows or mountain gap at its head, and thence in a westward direction, are connected with modern military expeditions rather than an antiquated avenue established by Mexican traders, reference is directed, without quoting the testimony at length, to the evidence of—

S. E. Stilwell, QQ. 10, 44 to 47, x-Q. 30, Rd. QQ. 4, 5 and 13.

R. P. Sanders, QQ. 29, 49, x-Q. 96.

J. J. Sturm, QQ. 35, 66.

Chas. Goodnight, QQ. 42, 47, 50, 51, x-Q. 42 to 47, Rd. Q. 1.

H. M. Kimball, as to trail from Adobe Walls on Canadian to McClellan Creek, Sweetwater and Ft. Elliott being a new trail comparatively in 1887.

Cassimero Romero, QQ. 1 to 7, 15 to 18, showing old road on Canadian, called Red River by the Mexicans; new road to Elliott or Mobetie; old road extending 40 miles below Adobe Walls (x-Q. 11).

J. M. Robinson (scout for Gen. Miles); road from Canadian to Ft. Elliott not there in 1874 (Q. 5); made by Government wagons (Q. 7); knows of a trail on Canadian for 75 to 100 miles below Adobe Walls (QQ. 9–12, and see x-Q. 82 to 85).

A. L. Yeckley considers old road on Otter Creek 30 to 40 years old (QQ. 26, 27, 30, 31).

J. T. Tierce; road from Ft. Elliott towards Comanche Springs known as Government trail seemed to be 8 or 10

years old in 1880 (QQ. 13, 18); no sign of any other road there (x-Q. 3); Comanche Springs one mile from North Fork, 8 miles above Devil's Canyon (x-QQ. 9, 11).

Jno. M. Passmore; trail on Canadian turns south about 100 miles east from Greer; going thence to the Washita, and would cross Red River near its mouth (QQ. 30, 35). It is called Santa Fé trail (Q. 35). Several old trails called Santa Fé trail, including the one at mouth of Sweetwater which goes to Adobe Walls (x-Q. 107, Rd. Q. 3). Has travelled it to Ft. Sill, and looks like just common teams had travelled it (Rd. QQ. 4, 13).

Horace P. Jones; General Grierson's road from Ft. Sill to the mouth of Otter made in 1868 (QQ. 41, 43, 50); military road down Washita and Paul's Valley to Ft. Arbuckle and Ft. Cobb (QQ. 44, 47); never heard of Santa Fé trail going up North Fork until late years (Rd. QQ. 13, 14).

James Daley, with Evans' expedition in 1866 from Ft. Smith to New Mexico, crossed over a road called Marcy trail (QQ. 9, 10). Was with Gen. Mackenzie in 1872; was at head of column when they crossed Red River, and knows they opened a new road to Otter Creek (QQ. 57, 62).

Dave Remington, assistant wagon-master with General Custer in 1869; went through Mountain Pass on Otter, and they made the road, none being there then; went up Salt Fork (Elm) and thence to Fort Elliott (QQ. 14–15); knew Van Dorn trail running south from Otter Creek to Red River (x-Q. 55).

Concluding the argument as to the location of the alleged Santa Fé trail from Natchitoches, it is insisted that this contention on the part of the State of Texas has never been suggested in any controversy touching the subject-matter of this suit until a feeble reference was made to it before the commission of 1886, and when the answer was filed in this

cause, counsel had to wait for the testimony of the recently settled cow-boys in order to locate the crossing of Red River near to North Fork, and the route of the old trail practically near its banks, for the entire length of the stream.

That there was an early trader's route from Natchitoches is not denied; but that it ever touched the North Fork of Red River is, we insist, without a scintilla of reliable proof. On the contrary, we maintain that the traders' route of the earliest commercial intercourse along Red River westward from Louisiana crossed that stream 150 miles east of North Fork, and, passing up the east and north side of the Washita, formed a junction with the real Santa Fé trail, which skirted the Canadian along its upper waters, which were supposed to be at that time a part of the Rio Roxo de Natchitoches. The road from Santa Fé to Independence was only made in 1825.

And we adopt the following extract from the argument of Maj. Brackenridge, chairman of the Texas branch of the joint boundary commission of 1886, in support of this position:

"The early settlements of the western portion of the Mississippi Valley, embracing the Missouri River, the Arkansas and Red Rivers, were made by the Spanish at Santa Fé, El Paso, San Antonio, and Nacogdoches. The Spanish trail from San Antonio to Santa Fé via El Paso, and to Nacogdoches, in Texas, crossed streams emptying into the Gulf of Mexico, and the names they bear attest the nationality of the explorers.

"The French settlements were at Nachitoches, on Red River, Natchez, and Saint Louis, on the Mississippi. The explorations from these settlements throughout the region north of Red River gave names to the rivers in that region. Traders established trails from Saint Louis reaching to the neighborhood of Santa Fé, from Natchez and Natchitoches, up Red River, the Ouachita, of Louisiana or Arkansas, and the Arkansas River.

"A trail of trappers and traders, up Red River to the neighborhood of Santa Fé, was up the southern bank of that stream until near the mouth of the False Washita, where it crossed Red River, following up the north and east bank of that stream, upon the divide between the Canadian and the Rio Roxo of Natchitoches. Red River beyond the Wichita Mountains had its course north and south, where traders visiting tribes of Indians left this stream; and north and west beyond this point the trail struck what is now known as the Canadian and dry fork of that stream, which they naturally thought the same stream or a prolongation of the Rio Roxo of Natchitoches. They were confirmed in this idea by the Indians calling all the streams in that section (on account of the color of the water) by this name. Therefore, Humboldt was led to believe that the first streams south of the Arkansas was Red River and tributaries of that stream. Traders knew nothing about Red River above and in the neighborhood of the settlements, where the trail left it.

"Marcy, in 1849, when laying out a road from Fort Smith for California emigrants, says that he located a trail or road on the divide between the Washita and Canadian Rivers; that he found evidence sufficient to satisfy him that this was the route of the old trail. Those passing up north of the False Washita, which is truly the North Fork of the Red River, crossed it near the Antelope Hills; and when they crossed the branches of the Canadian, beyond and above, they supposed it to be the North Fork of Red River, and in this they thought they were confirmed by the Indians. Hence, all of those streams heading north of the thirty-fifth parallel up to to the thirty-seventh north latitude, south of the Canadian, were supposed by the French and Spaniards to be the headwaters of the Rio Roxo of Natchitoches, and Humboldt so platted it, and Melish adopted his platting, and the correctness of their work was not questioned by any one at the time of making treaty in 1819, and the contrary was not known until August, 1820, one year and six months after the terms of boundary had been agreed upon. Colonel Long was, while exploring the headwaters of the Missouri River, ordered by the Govern-

ment of the United States to proceed, after finishing his work, across the country and go down the Rio Roxo of Natchitoches, which he undertook to do. Taking a branch in the proper latitude corresponding with the maps as to the Rio Roxo of Melish, and from all other information he could gather, he was satisfied that he was on the Rio Roxo of Louisiana; but after descending it about 200 miles, he tells us, he met Indians, who told him that he was descending Red River. After proceeding to the mouth he found that he had descended a tributary of the Arkansas, and it was too late in the season to retrace his steps and descend Red River." (P. 120, Record.)

See also Humboldt, pp. 83–84, Record.

Old Settlements.

Since Mr. Settles settled near Settles Creek, and since this suit was started, still another theory has been urged with great persistency, viz., that the North Fork of Red River and its tributary, Otter Creek, contain evidences of old Spanish settlements and Indian villages which are identical or coincident with certain locations delineated upon Humboldt's map of 1804, and designated thereon by the names San Calixto, Canoatinos, and Canesis, meaning "rancho stations de muletiers." Other signs of former habitation are sought to be associated with the location of Indian villages by the Pawnees, Taouaiazes, Quirechas, and Quichicans.

A still further effort was made to show the existence of Spanish or Mexican mining camps near the waters of the North Fork and its tributaries.

Stations de Muletiers.

Mr. Freeman, of counsel for the State of Texas, did, as a member of the boundary commission of 1886, in an argu-

ment presented by him, insist that these ancient livery stables of Humboldt's map were identified by Gen. Marcy "on the North Fork of Red River, in the decaying stumps of trees cut down a long time before," and therefore Humboldt's Red River could be no other than the North Fork. (H. Ex. Doc. 50, p. 140.)

Accepting the qualification which the expert witness, Mr. Chas. Corner, gave in his answer to the 20th Rd. Q. in regard to his admission in x-Q. 68, we find the following conclusion in regard to these supposed Spanish settlements, viz., the two locations designated as San Calixto and Canoatinos, are upon the Canadian or Rio Colorado, and not upon any branch of Red River. For Mr. Corner testifies, in regard to the Humboldt map, as follows:

"20 Rd. Q. On page 10 line 33 of Melish's geographical description accompanying his map of 1818 he uses these words: 'In constructing the map recourse was had to the following materials . . . (page 14, line 12) for the Spanish part Humboldt's very excellent map was selected as the basis, use being made of Pike's travels for filling up some of the details.'

"I will now ask you from whose map the region about Santa Fé and including the head of the Rio Moro and Rio Rojo Rivers appears to have been delineated by Melish, and whether or not the explanation just quoted accounts in any way for the mythical connection between the Moro and Rojo and the Red River of Texas and Louisiana shown in his map.

"20 Ans. I think the position and mapping of the Rio Rojo and the Rio Moro are the same (in Humboldt's map) as that of the Rio Rojo and the Rio Moro of Melish's map. Humboldt's map shows a break in the connection between these two streams and the forks of Red River, with an explanation, 'it is believed,' &c. Melish fills in this break and makes the 'river' continuous *to the forks*. This, I think, explains the whole of Melish's erroneous mapping of *the South Fork of Red River*. Manifestly the best known

stream would be more accurately plotted than one not so well known. At least this statement applies to the North and South Forks of Red River as they are shown on Melish's map. In this connection I wish to say that the identification of the South Fork of Red River marked in red ink on my Exhibit B refers to *the lower portions* of the said stream as they might evidently become known in connection with a knowledge of its forks."

The station called Quichicans is below the junction of the North and South Forks, and on the South Fork of Red River.

If we admit the position taken by counsel for Texas, and discard Mr. Corner's deductions from personal observation and scientific inquiry; and if we concede, for the sake of argument, that neither Melish nor Humboldt laid down the South Fork or Prairie Dog River at all, then each and every one of these so-called stations de muletiers, except San Calixto, is located east of the point where Prairie Dog River, if laid down, would join the Rio Roxo de Natchitoches, and San Calixto is on the Canadian. Not a single village is delineated, on either of said maps, east of 106° west longitude, except the Chichi, between 96° and 97° west longitude, and on the parallel 32° north latitude.

If Melish knew the head of the Canadian and supposed it was the head of Red River, it is probable he knew of stations de muletiers on the part of that stream where the trail certainly ran beyond Adobe Walls, and San Calixto is very likely properly located on the Rio Colorado.

The Melish map of the treaty offers not the slightest evidence by which either fork of Red River can be identified with either Spanish or Indian settlements, and yet it is more prolific in locating Indian villages than either Humboldt or Pike. The Pawnee villages on this Melish map are on the south side of Red River, at about 96° west longi-

tude, while the Caddo village is located at the point where the Sabine River intersects the 32° north latitude. There are Haytones and other wandering tribes of Indians south of Red River, but all many miles east of the forks. Melish's map of 1823 is absolutely barren of information bearing on this subject, though it does show a road to the Pawnee villages north of 41° north latitude, which road starts from the Great Spanish road to Red River, near the mouth of the Dry Fork of the Canadian, and goes northeast to the point indicated. Catlin's outline map of 1833 (p. 171, Record) locates Comanche villages from the Rio del Norte at parallel 32° and at the head of the Washita, and Pawnees from 35° to 42° north latitude. In 1847 Disturnel shows Toyash village on the north side of Red River, east of the False Washita, and villages of the Pawnees on the south side of Red River, some distance further eastward. (See testimony of Lieut. Beach, QQ. 77 to 79, 85–86, 117.)

Each of the locations named by Mr. Corner is designated on Humboldt's map by the figure which represents the stations de muletiers, but it is evident that, so far as Quichicans and Quirechas are concerned, they had no relation to such places, but represent Indian villages. The testimony as to evidences of Spanish or Mexican origin of any of the points named is confined to the place visited by Prof. Cummins; and while many witnesses have been examined on this point, but few were competent to form any opinion and could merely describe what they saw and their impressions thereon. The review of this testimony, therefore, will not embrace all the witnesses examined on the subject, but will be confined mainly to those whose association, experience, or knowledge entitles their judgment to any consideration whatever.

Prof. W. F. Cummins, in 1892, was sent to examine some reported gold and silver prospects, and in the neighborhood

of the Devil's Canyon found evidences of two old towns or villages. The one furthest west is the one under consideration, the other being conceded to be an Indian village. The so-called Mexican town covered about 20 acres, the houses about 12 feet wide, and 12 to 18 feet long; no excavations appear to have been made; found many bones, mostly of the buffalo, but some of deer, antelope, etc., scraps of copper, brass, and silver, pieces of iron, beads, pipes, whetstones, gun-flints, pottery, and buttons. It was about one and a half miles to the west of the Indian village. Both are on the north side of the river (Q. 9). The trees growing show the Mexican town to have been much the oldest (Q. 12). Marcy passed within 200 yards of Mexican town (Q. 16), but does not mention them. The cutting of the trees indicated being done by Mexicans (Q. 20). Found copper ornament, probably fastened on leather; gold button, American manufacture; pipes made of the native soft sandstone (Q. 20). J. C. Settles told him of this place. It was a mile and a half from his house (x-QQ. 27–29); could form no approximation as to its age from anything that he saw (x-Q. 44). A tradition of Mexican settlement there at early part of the century (x-Q. 46); found iron Indian arrow-head there and some beads (x-QQ. 53–54).

E. R. Fletcher found old Mexican town near Tascosa, Oldham county, on the Canadian, some 40 miles from New Mexico (QQ. 8–9 and x-QQ. 27–30).

J. C. Settles locates the town as 3 miles below the mouth of Elm, and a half mile from the river-bed (QQ. 19–20); found pottery, which he supposed to be Spanish crucibles, and eight or ten tons of "natural ashes; no mistake about that;" dug 10 feet down ash-pile; found traces of men—bones, skulls, arm-bones, etc. (Prof. Cummins saw no human bones); believed it a Spanish settlement because an Indian told him, and a Spaniard told him of a place on the side of a moun-

tain where they had been working for money or mineral; had dug down through solid rock, and at the bottom of that place was all the money we wanted. "In looking for that old place I came across this place, and I think this is the old town" (Q. 25). This was in Greer county, on the south side of the river, and looks like it had been worked; it was 6 miles from the town, on the north side (QQ. 26–30).

S. C. TALLEY lived in Greer four years; knows a place on south bank of North Fork about two miles above the mouth of Spring Creek resembling a circus ring, but larger; tradition is that a fight between Indians and white people took place there (QQ. 30–32).

J. T POLLARD was with Prof. Cummins; judged it was a Mexican town because two old Mexicans frequently stopped at Doan's, and said they were captured right there by the Indians where they were mining (Q. 60) (Pollard had only lived three years in Greer); saw marks on the trees the same as Mexicans put on their horses, but did not know whether they were letters or characters to represent something; an old broken crucible made of earthenware (Q. 62–63); found adobe walls made out of mud and grass, and dried in the sun, just like buildings in old Mexico; rock walls built up in places and finished out with adobe; could see from the walls where it had tumbled down.

W. B. KISER was recalled in regard to the location of an old town, and describes its rock walls very similarly to the witness Pollard (Q. 5), but he locates this town as about sixty miles from the North Fork (Q. 4), on the Canadian River, in Hemphill county (x-Q. 4).

S. H. TITTLE saw old rock walls and old chimney-places which indicated it was of Mexican or American origin (QQ. 16, 21, x-QQ. 1–3); saw a lot of beads (x-Q. 6); was not there over 20 minutes (Q. 17).

A number of other witnesses refer to these villages, but

their opinions are not deemed of sufficient weight to prolong this argument by citations.

At the instance of counsel for the United States, Prof. Mooney, of the Bureau of Ethnology, visited the location after the foregoing testimony had been taken. He has given twenty years' attention to the manners, customs, and traditions of the northwestern Indians. In October, 1893, he visited the so-called Mexican settlement sites. He was accompanied by John Passmore and Mr. Blalock; describes with great particularity the locality and all its surroundings; brought back with him specimens of the so-called ashes from the cave, the metates, stone hatchet, iron arrow-head, and other fragments of things found there, including many bones taken from bone-pits (QQ. 12–13), and is satisfied that all the indications point to Indian origin—Wichitas, Caddos, Pawnees (QQ. 14–19); describes the so-called wells as Indian caches for preserving vegetables for winter use (Q. 20); the bones invariably split open exhibited universal customs of prairie tribes (Q. 21); identifies the mounds or earth-lodges (QQ. 24–25); no evidence of adobe found there (Q. 27); the same man pointed the place to him that was with Prof. Cummins; applied to State geologist of Texas for permission to examine Prof. Cummins' specimens, but failed to get them (see correspondence); accounts for the cutting of trees as by settlers (QQ. 31–32); old Indian manufacture of metal goods (Q. 33).

Joseph S. Diller, geologist in the U. S. Geological Survey since 1883, who studied his profession at Harvard and Heidelburg, examined a part of the so-called ashes submitted to him by Mr. Mooney, and has "not the slightest hesitation in emphatically stating that it is ordinary sand, such as results from the disintegration or rotting and decay of rocks" (Q. 6); but a person looking for ashes might readily suspect it to be such Q. 7; see x-QQ. 7–10); did

not know what the analysis was being made for (x-Q. 13); had sufficient of the material for his investigation (Rd. Q. 1).

A. J. MEERS, the county surveyor of Greer, found the signs of Indian camps all over Greer county in 1885 (Q. 31); was with Prof. Cummins at Devil's Canyon; describes the villages and signs of settlements on both sides of North Fork, but says nothing as to any evidences of Mexican occupation. This was in 1890. In 1893 this witness was examined again, and the witness describes the discoveries from Q. 25 to Q. 71. He concluded it was a camp of the Wichitas (QQ. 29–34); describes particularly the discoveries at so-called Mexican town (QQ. 36–40). The larger town seemed to be the older from the size of the trees (Q. 41). The openings of the habitations seemed to be in the east (Q. 42); probably a different tribe of Indians in western town (Q. 43); metal found there seemed to be beaten by hand (Q. 45); lots of beads there (Q. 46); did not see any tree over 10 inches (QQ. 48, 49); did not see any posts in western town (Q. 50); never heard of the place being a Mexican town until settlers spoke of it about 4 years ago (QQ. 57–59); never saw any houses in Mexico like these (Q. 64); most of the wood chopping was in the eastern town (Q. 66); Wichitas build log houses with notched logs (x-Q. 57); bones under the dirt in the mounds (x-QQ. 63, 64); the stumps in both towns were cut mostly square (x-Q. 65); saw rocks in cave, probably debris from overhead (x-Q. 69); might be work of captive Mexicans (Rd. Q. 1).

Dr. J. J. STURM, a member of Caddo tribe, age 65, at one time Indian agent, familiar with Wichitas, Caddos, Comanches and Apaches, is Indian interpreter; Caddos used to build picket houses with thatched roof (Q. 50), described in question 51, as follows:

"They set up two forks, probably twelve to fifteen feet high, and lay a pole across these two forks, and then they set up the pickets, sometimes in a square with five or six openings, and the pickets are tied to these poles with pieces of bark skinned from poles; then when the house is completed the inside of the house is made perfectly level, and on the outside they would bank up with dirt. They took poles and skinned the bark off and laid them up over the frame poles which were laid over the two forks and then tied the rafters to these poles; took some small poles and laid them across the rafters, a good deal in the style that white people now lay sheeting to cover with shingles. They used grass; tied it on in bunches, what is known as a thatched roof in this country. They made a very good roof out of grass that kept out the cold and rain too."

He identifies the place by the rooster tradition (Q. 47), the shapes of these Caddo houses (QQ. 52–54); Caddos made vessels and pipes of clay, ornaments from silver dollars, etc. (QQ. 58–62), also the Delawares (Q. 63); Caddos and Wichitas an agricultural people; how they preserved their products (Q. 64); the working of clay into vessels and pipes (Q. 67); Mr. Settles' description suits the Caddos (Q. 68); breaking of bones for the marrow (Q. 94).

Bull Wilson, a Delaware, identifies the place as a Wichita village where they planted corn and pumpkins (Q. 19). They lived there when he was a boy (Q. 21).

Nasthoe, a Wichita chief; the village was known as Kidi-kit-tashe (Q. 19); first saw it 26 years ago; describes it (Q. 25); the mountain is called Kates-ho-ko-tuck, which means villages on side of mountain; the villages extended for 7 miles (Q. 36); was told when a boy by a very old man that Mexicans used to come from Santa Fé to trade at that village (x-Q. 1–10); a white man also came from the east trading (x-Q. 12); never heard about the monks (x-Q. 24);

never heard of battle between Wichitas and Spaniards (x-Q. 28); was told about white soldiers from Washington bringing Osage captive to Wichita village, and Kiowa girl; this was not long ago (x-Q. 35–'7); Wichitas once known as Toy-way-hash (x-Q. 40); the Toy-way-hash village was west of the Wichita (Rd. Q. 3).

Ta-wak-o-nee Jim, Wichita chief, describes two villages 500 years old from history (Q. 32); farming, picket houses, large entrenchments to protect families during fight; villages made by Indians, and the cave by Almighty God; where they kept corn, etc.; looked like cisterns; was a Wichita village; Indians and not Mexicans made the earthly ware and pipes, stone axes, iron spears, metates for grinding their corn; bought chickens from the Mexicans; knew Maj. Van Dorn about 36 years ago (Q. 32); bought ornaments from Caddos and Delawares (Q. 39); describes a canyon (x-Q. 9–10); how Indians learn history (x-Q. 18); the Pawnees used to visit and trade with the Wichitas; they came from the north (x-Q. 23–29).

A. L. Yeckley knows and describes village near Devil's Canyon (32–35 Q.); has been amongst Mexicans in New Mexico, Arizona, and California; nothing suggested Mexican origin but Wichita Indians (Q. 36–43); knows the so-called Mexican mine, and, having been amongst mines nearly all his life, is satisfied holes not made by miners (QQ. 49–51); sunk several shafts there himself in 1886–'7 (QQ. 52–'3, x-QQ. 38–41).

Geo. E. Blalock; the stone metates not like those the Mexicans use (x-Q. 23); thought the place of Indian origin (Rd. Q. 4).

Jno. M. Passmore, after conversing with Mr. Freeman as to supposed Mexican village, spent several days there; but became convinced it was Wichita Indian (QQ. 17–29); familiar with their customs for the past 20 years (x-Q. 77);

examined corn caches, found corn stalk in one (x-QQ. 80–86); about 7 acres on south side of river had been cultivated (x-Q. 87–96); irrigating ditch (x-Q. 100).

It is submitted that the conflicting statements and opinions in the evidence above cited furnish no substantial basis upon which to reach the conclusion that the location in controversy, or any part of it, was ever connected with Mexican or Spanish origin or history as a place of habitation. Those most familiar with the subject discountenance such a conclusion, and express opinions adverse to such a claim. We have already said this is a new idea or theory, and it seems to be one that would require an exceedingly willing mind to give it any credence upon the testimony presented in this cause.

But if the evidences of human habitation referred to are actual locations that existed long prior to the date of the treaty of 1819, there is nothing in this record to show that either party to the treaty had any knowledge in relation to them, and there is an utter absence of coincidence between their location and the designations of stations de muletiers upon ancient maps. Several witnesses testify to captive Mexicans adopted by the Indians, whose presence in their camps would, we submit, account for the slight evidences of Mexican occupation which intermingle with the Indian surroundings.

Military Camps.

Radziminski.—Martinez says Radziminski is in Greer county, south of the mouth of Otter (QQ. 117, 128). The hunters and trappers who were with him in 1874 (Q. 66) called it Ft. Radziminski (Q. 128 and see Q. 161). There was a road from this fort to another fort, called Camp Otter, on Otter Creek, about 7 miles above its mouth and 4 miles below the old Santa Fé trail (QQ. 129–134). This latter

camp or fort is "made close to the head of a little creek which is made by a spring; and they have a trench where I suppose the soldiers went to the spring to get water. The fort is a ditch around, with breastworks" (Q. 131). He describes a place near the canyon at the head of Otter Creek, in answer to Q. 149, as follows:

"A. I have seen signs; some old rock looked like they had been buildings; they looked like they had been placed together. It looks like it had been occupied in years. Now, these places that I seen, they don't look like they had been placed with mud like the Americans or Mexicans do, but they were well placed, look like they might have been houses in time. There were lots of small places look like they had been built and had fires in—ashes.

"150 Q. Were those old buildings in that valley when you and the old Mexicans first went there in 1858?

"A. Yes, sir.

"151 Q. What was their appearance then with respect to age?

"A. They did not know exactly, just by hearing.

"152 Q. I asked you what was the appearance of those old buildings, as to how old or how new they were; do you understand me? (Ans. Yes.)

"A. It looked to me like it was old, old places.

"153 Q. You said that there were old Mexicans with you at that place who were acquainted with the country when you first went there. If they told you anything at that time about those old ruins, state what they told you about them.

"(Question excepted to by counsel for the United States.)

"A. I heard them saying that they were built *by Spanish people.*

"154 Q. Anything else?

"A. No, sir."

How little dependence can be placed upon Martinez or his informers, the Mexicans, can be judged when it is seen that in 1874, the time to which he refers, there was actually

a cantonment of soldiers on the west side of Salt Fork, in Greer county, in all probability the very place that Martinez has more recently seen, and which he calls Radziminski. At the same date, about six miles from the North Fork, on the south side of Otter, there had been another cantonment, in all probability the original Camp Radziminski. (See evidence of J. J. Sturm, Q. 11.) There were really two camps Radziminski, one 5 or 6 miles from the mouth of Otter, on the east or south side of the creek, and the other near the Narrows, at the head of the creek. This is proven beyond a doubt. Gen. R. W. Johnson, an officer on duty there from September, '58, to February '59, says that Radziminski was about 18 miles above the mouth of Otter (Q. 7), probably a little less (x-Q. 3); got stone to build chimneys from the mountains, 5 miles distant (x-Q. 4); probably thirty or forty chimneys (x-Q. 5).

Dr. J. J. Sturm visited Radziminski at the head of Otter, near the mountain, in 1859, while Van Dorn was there (QQ. 8–10; see also x-QQ. 24–39, x-Q. 47, and Rd. Q. 1).

Patrick Larkin, Martin O'Connor, Urban Gebhart, and Chas. Loeffler were all in the United States Army, and at that camp. Their evidence coincides with Maj. Van Dorn's own reports, showing that Camp Otter, or Radziminski, was originally located on the east side of Otter, a few miles from its mouth. This is also shown on the map accompanying that report. The purpose to move the camp is referred to in Van Dorn's report, and the fact of moving to the head of Otter, near the foot of the mountains, is borne out by these several witnesses who were there.

Horace P. Jones, the old interpreter and scout, describes its location as on west side of Otter, in basin of mountain, about 15 or 16 miles from mouth (QQ. 6–9), and describes Capt. Warren Beach's camp of 1874 as being 10 miles below Radziminski, on the south side of the creek. Dirt

fortifications, and a ditch leading to a spring; has camped inside this place (QQ. 15–22); the stone for chimneys at Radziminski was obtained about 200 yards from camp (Q. 26).

James Daley was there in 1872; saw the butts of old chimneys (QQ. 34–37, x-Q. 11). Camp quarter of a mile from mountain (x-Q. 14).

John Chambers, Government teamster, says Radziminski near the head of Otter; saw it in 1879, its old foundations and ruins of chimneys. Knows Camp Beach, about five and half miles from mouth of Otter, with its ditch, redoubt or fortification; stayed there himself 40 days (QQ. 2–5).

Tar Poney knows it as a soldier camp by the things he saw there (x-QQ. 24–25).

Dave Remington saw Radziminski in 1869, when with Custer; a fellow-soldier recognized it (QQ. 2–9); and describes Beach's camp (QQ. 10–12; see also evidence of Gov. Ross).

If anything more were necessary to establish this location as a military camp, the following extract from the testimony of Wm. Ish, who was carried there by Mr. Freeman, seems conclusive:

"64 Q. Now between the pass, or the low place in the mountain, and the Narrows, what, if anything, did you observe that particularly attracted your notice?

"A. Evidences of an old town or place that had been inhabited by people.

"65 Q. Please describe that.

"A. Between the trail and the Narrows is a small, almost level valley; there is a range of mountains on the north; and in this valley is where that town was situated, if it was a town. It was where people had lived. I examined and found where there had been 13 houses or pens built of rock, and I more particularly examined three of those places. In digging down into those places or houses, I found fireplaces

where the fires had been built; found ashes underneath the ground in the fireplaces. The fireplaces consisted of rocks set up on edge, and the rocks had all fallen in, and it was overgrown with dirt. We found in there old rusty nails, pieces of bottle, glassware, and a great many other things, among them what seemed to be a piece of gun-barrel. I picked up the piece of gun-barrel, and in endeavoring to pick the dirt out of it with my lead pencil the gun-barrel crumbled to pieces in my hand. We also found some kind of metal that had been burnt, and it had the appearance of being gold; that we found in the ashes and other rubbish beneath the ground. We also found at another place, under a rock wall, pieces of glassware—bottles, I suppose—that must have been there for a long time. The glass had a coating of something that had formed over the glass—I don't know what it was—showing that it had been there for a long, long time to my mind.

"66 Q. How near, as close as you can estimate, to those ruins that you speak of as an old town was the old road that you have spoken of?

"A. About two or three hundred yards."

In contradistinction to the testimony of a witness like Ish, who was carried to this old camp under the influence of a theory already formed, attention is directed to the following intelligent description and history of the several points referred to, which is given by Judge Stillwell from an experience in that section of country covering a period of 30 years:

"13th question. Were you ever at Radziminski?

"Answer. Yes.

"14th question. Please describe its location.

"Answer. It is right near the foot of a small mountain; it is near where the main branch of Otter Creek comes through a small canyon. It is near the forks of Otter Creek. The first fork in going up the creek, branching off to the east, is known as Dry Fork; the other, I don't know what they called it.

"15th question. Which side of Otter Creek is the camp located on?

"Answer. On the west side.

"16th question. What were the evidences, if any, when you first went there and first saw it, of its having once been a military camp?

"Answer. I don't know that I can call to mind just what the evidences were any more than I understood from some men of the expedition that were with me (State of Texas here objects to the witness stating what he understood) that had been there with Van Dorn and who recognized it as Van Dorn's old camp. There were evidences of some temporary houses or cabins having been built; a number looked like they had dug some little cellars in places.

"17th question. Do you remember whether the evidences indicated whether they had used stoves or whether that had fireplaces and chimneys?

"Answer. I don't think I remember as to that. My impression that I got was that it was used as a winter camp above another camp, which he had situated farther down the creek.

"18th question. What was that other camp known as?

"Answer. It was known as one of Van Dorn's camps or cantonments.

"19th question. Which side of the creek was it?

"Answer. It was on the east side, at a spring. Considerable (the State of Texas objects to the witness stating anything except from his own knowledge; except as he knew it) improvements had once been made there; they had had a bakery or an oven which we supposed was for a bakery; built an oven there, but nothing permanent.

"20th question. Do you know of any military post having been established anywhere near the mouth of Otter?

"Answer. There were two temporary camps established in that vicinity in 1874; one below the mouth of Otter, on the west side of the North Fork of Red River, known as Buell's Supply Camp; another on Otter Creek, above the mouth, I should say eight miles, at the old camp of Van Dorn's; right at his old camp, which was established by Capt. Beach, of the 11th Infantry.

"21st question. Which side of Otter was that on?

"Answer. On the east side.

"22d question. When did you first see this camp that had been occupied by Capt. Beach?

"Answer. I think in 1871, the first time I was there at that place.

"23rd question. Before Beach had occupied it?

"A. Yes.

"24th question. Do you know of any circumstances connected with Capt. Beach's occupancy of it which would explain the present physical features?

"Answer. He fortified it; fortified his place there and dug a ditch—a long ditch—down to or near the springs. I don't know whether he dug it right to the springs or not. He dug a covered way. (Here the witness, pointing through the window where the examination was going on, pointed to a man and said, 'There is a man, John Murphy, who was right there with me at the time. I refer to the time when we struck Radziminski the first time, in 1869.')

"25th question. Have you any recollection touching the surroundings at Radziminski where the evidences of former occupancy were made apparent by the presence of rock piles or foundations for the base of the habitations, or any of them?

"(State of Texas objects to the question as leading and suggestive of the answer desired.)

"Answer. I have not. I remember seeing some stones that had been carted together I thought, or something of that kind, but nothing of the kind in the shape of foundations that I remember of.

"26th question. Do you know any person now living who was with Van Dorn when he was at Radziminski?

"(State of Texas objects to the question because it is evident from the witness's answers that he was not at Radziminski until it was abandoned by Van Dorn and he cannot know who was there with Van Dorn.)

"Answer. I cannot think of any one at present.

"27th question. When was the last time you were either at Radziminski or Fort Beach? Camp Beach?

"Answer. Three years ago this winter I was at both places.

"28th question. What was the condition of the two places respectively at that time as compared with when you were first there?

"Answer. Well, the whole face of the country has changed considerably. It is now used for a cattle range and there are lots of trails here and there, and the grass was grazed down; a good deal of timber has been cut and stolen, I expect.

"29th question. Do you know the location of any old Indian village or camp further north than the North Fork of Red River? If so, in what direction, and state as near as you can the location with reference to well-known landmarks.

"Answer. There are strong evidences to-day—'til yet, I suppose, or there was a year ago, or a year or two ago—on the Washita River about due north or a little east of north—very little east of north, if anything—on the north side of the river, of an Indian village having been there for a long time. They had some forts like the Wichitas make.

"30th question. Please describe what you mean by forts.

"Answer. Well, I can tell you the organization—way they did. They have a village and they will dig—well, what we would call a hole in the ground—big one—and throw up the dirt and bank it down at certain points of the village. That is for the young men to get into in case of an attack, and each warrior is supposed to know which particular place he is to defend. These are dug on the outside of the village. They would sometimes dig a larger one at or near the centre of their village, but that was generally in a permanent camp or camp where they intended to stay for the summer at least, to roast their pumpkins or little corn.

"There is also evidences of another village having been at some time at Deer Creek; still north of that and a little further east a stream run into the south Canadian from the south side, and, as near as I can guess, about thirty-five miles from this place—El Reno. It is up on Deer Creek, between the two streams. This main Canadian is what I refer to."

(See also R. P. Sanders, QQ. 19, 24 to 30, 37; B. T. Hawkins, QQ. 27–34, x-QQ. 22–30.)

The physical features of the country surrounding the territory in dispute, so far as it is claimed they tend to an elucidation of the controversy, having been disposed of in the foregoing review, we will examine the claim of the respondent asserted in the pleadings in this cause, based upon her long exercise of

JURISDICTION.

A review of the authorities cited by the State of Texas, in the effort to trace the history of Greer, as being claimed as part of Texas before the State was admitted as a State of the United States, will demonstrate how utterly fallacious and misleading is this contention.

On December 9, 1891, the date of argument upon the demurrers, counsel for the State handed to counsel for the United States a printed paper called "Historical Sketch of Greer County in the State of Texas," which, however, does not appear in the printed record. It quotes the boundaries of Greer from the act of February 8, 1860; declares that Greer was originally a part of Fannin county; boundaries defined November 28, 1839; that Cooke next embraced Greer under act of March 20, 1848; that Clay next embraced Greer under act of December 24, 1857; and that Greer was created out of Clay county February 8, 1860.

A glance at any map of Texas ever published will refute this historical sketch. Sec. 2664 of Sayles' Early Laws referred to gives the following boundaries of Clay county: "Beginning at the southwest corner of the county of Montague and thence west with the northern boundary of the county of Jack to the northwest corner of said county; thence north to Red River and thence down said stream to the northwest corner of Montague," &c.

It is sufficient answer to this claim to show that Clay county, at the nearest point, was about sixty miles east of Greer, and Montague about ninety miles.

Nor was Greer originally a part of Fannin county, for that county had its western line east of the cross timbers. (See p. 53, Acts of 1837, vol. 2, Laws of Republic, and Emory's, Stephen F. Austin's, and other maps, showing this to be nearly 100 miles east of the confluence of North and South Forks.)

It is true these boundaries were changed in 1839 and the line extended from a point starting from the mouth of the Bois d'Arck and running sixty miles south of Red River; thence westward to a point south of the head of Upper Washita (meaning Big Wichita) and thence north to Red River. (See p. 184, Acts 4th Cong., 1840.)

The purpose of this legislation seems to have been to absorb the John Cameron grant. His line ran 60 miles south of Red River; thence westward to a point south of the head of Big Wichita, as shown on map compiled by Stephen F. Austin. (See Exhibit Tanner's Map, p. 293, Record, and Gregg's map, p. 168.) And the records of the Texas land office show the northwestern corner of this Cameron grant as being on Prairie Dog River.

In 1858 they had learned the name Prairie Dog Town River for the main prong, and hence Hardeman county is described as cornering on that stream; but it is a pregnant and strongly suggestive fact that on the map (Ex. R. C. No. 9, p. 292, Record) this corner is shown as being on Creuzbaur's Salt Fork, thus recognizing that the "map in use up to 1858" recognized that stream as the main Red River. Mr. Pressler says that De Cordova's or Creuzbaur's Salt Fork coincides with Prairie Dog Town River.

The proposition is set forth on page 16 of the answer of the State of Texas that the legislation of 1850, by which

the State, for valuable consideration, fixed her northern boundary as commencing at the intersection of the 100th meridian with the parallel of 36° 30′, operated as an "abandonment by the United States of America of all claim of right, title, or interest in and to any or further territory *then claimed* by Texas," etc. (p. 16, answer); and it is contended that this legislation operated as an estoppel, and is expressly pleaded in bar of any recovery in this suit.

It is further contended that there was no necessity, and it was never contemplated, that the line from the Red River of Rio Roxo "should ever be actually run or otherwise fixed" (p. 24, Record).

Without entering at length into a discussion at this point upon the doctrine of estoppel as applied to this case under this contention, further than to rely upon the established rule that estoppel cannot be pleaded where the party pleading has not acted upon and accepted the acts relied upon, we will review the facts bearing upon the plea.

Did the State of Texas rely upon this act of 1850 as settling the question whether the North Fork or the South Fork of Red River was the point of intersection for the initial monument at the 100th meridian? All the evidence in this record shows to the contrary.

First. In 1852 the first real survey of these two streams was made by Capt. Marcy, and in his report he declared the South Fork or Ke-che-a-que-hono to be main Red River.

Second. On February 11, 1854, the legislature of Texas, without any invitation or suggestion on the part of the United States, passed an act for the appointment of boundary commissioners as soon as Congress should pass a similar act, who, together with a surveyor and clerk, were to run and mark the identical boundary line referred to in this pleading "from the point where it leaves Red River to the point where it intersects the Rio Grande" (p. 55, Record).

Third. On June 5, 1858, the act of Congress providing for joint commissioners on the part of the Government became a law (p. 55, Record).

Fourth. This act of Congress was not passed until after a survey of the 100th meridian by Jones & Brown had been provided for under contract of October 13, 1857. These surveyors placed the monument for the 100th meridian upon the Ke-che-a-que-hono, and prolonged the line to 36° 30′ north latitude. They say "there can be no doubt as to the fact of its being the main branch of Red River." (See p. 73, Record.)

Fifth. The joint commission met in 1859, but no agreed results were reached; the commission dissolved, and the United States commission continued the meridian up to the Kansas boundary (p. 102, Record).

Sixth. The joint commission, in the preamble to the resolution to adjourn without day, declare the adjournment to be the result of "a disagreement on the question of fact *necessary to be determined*, to wit, the river of the treaty" (p. 125, Record).

Seventh. Gov. Roberts, in a message to the Texas senate and house of representatives, dated August 10, 1883, gives the following history of the conflict respecting the title to Greer county:

"For many years after the late civil war this claim of Texas received but little attention. The valuable lands within it, and the growing scarcity of public lands subject to location, caused the subject to be agitated to some extent immediately before and after I became governor, four years ago. But few persons then knew anything of its history. Melish's map, referred to in the treaty, was not accessible, and the recent maps laid down the course of Red River and its prominent branches in a way to discourage investigation. The authorities of the United States had estab-

lished an initial corner on the South Fork of Red River, in the line claimed to be the 100th degree of longitude; had sectionized the country east of that line, and protected it from settlement of white people, as a part of the Indian Territory. Still it was said that during Gen. Houston's administration, in 1860, there was an effort by a joint commission to establish the boundary line, which had failed, and that Gen. Houston then contended that the line should run up the North Fork of Red River. His extensive information of this frontier country and its history inspired confidence in the merits of the claim of Texas, notwithstanding all the discouraging facts mentioned. Application was made to me to know if I would sign the patents if certificates were located and surveyed in Greer county. Under the then existing circumstances, I felt it to be my duty to discourage such locations, as they might be to our prejudice in the settlement of our claim with the United States, when the merits of it could be more fully ascertained.

"Pursuant to that policy, Senator A. W. Terrell, who had confidence in our claim, and took a lively interest in the adoption of such measures as might secure it, prepared and had introduced in the senate a bill, which promptly passed both houses of the legislature early in the regular session of 1879, 'to set aside the public lands embraced within the territorial limits of the county of Greer to educational purposes and for the payment of the public debt.' It was then believed that the United States would be more favorably inclined to recognize the claim of Texas if the lands should be devoted to such meritorious objects of a public nature." (P. 105, Record.)

Gov. Roberts then proceeds to show the passage of an act by the legislature of 1881 granting land certificates to the Texas veterans of 1836, whereupon one Col. Swisher became interested by speculation in this subject, having advanced $8,000 on 98 certificates held by veterans who retained a substantial interest themselves, besides devoting two years of his time, at his own expense, in continued

efforts to secure a surrender of the claim of the United States; and, referring to Col. Swisher, the governor says: "His faith in the justice of our own claim never failed, while others doubted or despaired of its success" (p. 106, Record).

The petition of Col. Swisher and 100 others presented to the United States Congress in March, 1882, seems to urge a relinquishment of the Government's claim, not only from any faith which they entertained while others doubted and despaired, but they sought such relinquishment to be granted upon conditions requiring the State of Texas to surrender the territory to the veterans who were prosecuting the claim, as appears from the following extract from page 4 of petition of Texas veterans to Congress, March, 1882:

"The reason why we ask the relinquishment to be made upon certain conditions is that we believe the State owes something to the past and present as well as to the rising and future generations. Texas has already given a princely domain of upwards of fifty millions of acres to educational purposes, to be shared alike, without distinction of race or color. While the old soldiers and widows of soldiers whose valor and blood acquired it all are permitted to drag out a miserable existence, many of them without the rude necessaries of life, too old and decrepit to work, too honest to steal, and too proud to beg.

* * * * * *

"In conclusion, we beg to remind you, not in a spirit of braggadocia, that our victory at San Jacinto and maintenance of the independence of Texas through ten years of fearful strife made the occasion that added immense possessions and wealth to the United States, and the Congress, even if Texas had no right to the territory in question, in recompense can well afford to smooth our rugged pathway to the hereafter by settling the disputed boundary in the manner indicated." (P. 116, Record.)

Another ground of estoppel or plea in bar, set forth in

the answer filed in this cause, is the allegation that between 1850 and 1860 the defendant sent her soldiers "upon said territory to drive off hostile and marauding savages and to protect her citizens therein;" and that the United States acquiesced therein.

J. W. WILSON was in the Texas rangers between 1854 and 1860. He testifies that they considered the South Fork the boundary line which the Indians were not permitted to cross, and they did not follow them across unless the Indians had been stealing horses, because they supposed they were in their own territory. If pursuing them for stealing they would follow them to the Wichita Mountains and boundary of New Mexico (QQ. 6–10).

J. T. POLLARD belonged to Ross' rangers in 1859–'60; proves that in this campaign the United States troops and Texas rangers were co-operating together (x-Q. 22), and that they fought in the Indian Nation when he was with Ross and Van Dorn (x-Q. 28).

Gov. Ross, captain commanding Texas rangers, testifies that the Federal court enjoined collection of taxes (11 x-Q.); the public men of Texas did not generally entertain any claim to the Melish meridian (x-Q. 17); never claimed jurisdiction except over Greer (x-Q. 19).

Gen. R. W. JOHNSON, with Maj. Van Dorn in 1858–'59, says the fight with the Indians was about 80 miles northeast from Radziminski (x-QQ. 34–35).

Gen. CABELL says Van Dorn made his Camp Radziminski on the east side of North Fork to prevent any conflict and to avoid claims for timber cut by the army, and for that reason they never went into Greer to get wood or hay (QQ. 10–11). This is in conflict with all the testimony showing there is no wood in Greer, but plenty on the opposite side of North Fork, and on Cache and Otter Creeks. He admits there was no recognition of the boundary line, but that

the army officers always solved every doubt in favor of the State (Q. 23, x-Q. 77). His ideas about the boundary were very vague (see x-QQ. 6 to 33). In ascertaining boundaries used Melish's map down in Texas, but not in the territory (x-Q. 30). They relied on Indian guides rather than maps (Rd. Q. 2).

Col. J. S. FORD, referring to the same campaign, declares that both the Texas and United States troops pursued Indians wherever they could be found, and never heard any question raised about boundary lines\(x-QQ. 12–20).

The route of Col. Dodge's expedition in 1834 was directly into the heart of Greer (see map, p. 172, Record).

We submit that there is absolutely nothing in this record showing a claim to or exercise of title and jurisdiction to and over the territory named which could be construed as adverse to the claim and title of the United States Government. During this very period not only had the military expedition under Marcy declared South Fork Main Red River, but Jones and Brown, under a contract with the United States Government, had marked the boundary claimed by that Government as its dividing line with Texas. Thus is the claim of acquiescence completely refuted.

It has been contended in a paper called "Historical Sketch of Greer County," filed October term, 1891, that Greer was originally a part of Fannin, boundaries defined November 28, 1839, and became a part of Cooke county March 20, 1848 (Sayles' Early Laws, art. 776, and *id.*, vol. I, art. 1555).

In refutation of this claim see Cordova's map of 1849, showing South Fork of Red River as the northern boundary of the western part of Fannin land district. The proof is overwhelming that at that date the region of country was practically unknown; no survey had ever been made, and the legislative acts of 1839 were following the language of

the treaty of 1819 in defining the boundaries, without any present knowledge or purpose of intending the North Fork of Red River as the boundary stream referred to.

It has been claimed that in 1843 the expedition of Col. Sniveley to intercept traders between Santa Fé, N. M., and Independence, Mo., was arrested upon Texas territory east of the recognized meridian, and that the Government of the United States recognized said act as illegal, and made compensation therefor to the Republic of Texas.

Col. John S. Ford, in arguing the case before the boundary commission of 1886, says: "I again refer you to the expedition of Col. Jacob Snively in 1843. It resulted in the armed occupation of the country in question and the eventful invasion of Texas soil by Capt. Phillip St. Geo. Cooke, of the United States Army. Sniveley's command surrendered to Capt. Cooke on the Arkansas River. The Congress of the United States afterwards acknowledged the claim of Texas to the soil and the illegality of Capt. Cooke's proceedings." (See Yoakum's Hist. of Texas, vol. 2, p. 405).

The utter fallacy of this claim will be found by reference to the diplomatic correspondence between J. C. Calhoun, United States Secretary of State, and Mr. Van Zandt, Chargé d'Affaires of the Republic of Texas, and the action of the Congress of the United States in relation thereto.

It there appears that the action of Capt. Cooke was the subject of a military court of enquiry, whose finding declared that he did not exceed his authority; that the arrest of Col. Sniveley was within the territory of the United States; that there was nothing harsh and unbecoming in the conduct of Capt. Cooke, and "that the confidence reposed in him by his Government was not in any degree misplaced." These proceedings were approved by the Secretary of War. This position was insisted upon by

Secretary Calhoun, and in order to avoid "irritated feelings between the two countries," and asserting then, in 1844, the necessity of an "actual survey and demarcation of the line dividing the two countries between the Red and Arkansas Rivers," it was proposed "to restore the arms taken from the Texan force or to make compensation for them." This proposal was accepted by the Republic of Texas, and Congress (see 2 U. S. Stats. at Large, 1847, vol. 9, p. 168) appropriated a sum for that purpose, with a proviso—"the account to be settled by the proper accounting officer of the Treasury Department" (pp. 137–'9, 109–110, 143, Record).

The history of the Sniveley expedition referred to, as related in Gregg's Commerce of the Prairies, does not, in view of the demands just quoted, add any glory to those engaged in it. Speaking of the disarming of Col. Sniveley's men, Gregg says: "A portion of the Texans, however, deceived the American captain in this wise. Having concealed *their own* rifles, which were mostly Colts' repeaters, they delivered to Capt. Cooke the worthless fusils *they had taken from the Mexicans*, so that, when they were afterwards released, they still had their own valuable arms, of which, however, so far as the caravan in question was concerned, they appear to have had no opportunity of availing themselves" (p. 168, Record).

We have thus disposed of the claim of acquiescence by the United States in the alleged jurisdiction of Texas over the disputed territory up to the year 1860. It was in February, 1860, just after the dispute between the boundary commissioners in 1859, and the year before Texas withdrew from the Union, that the act of declaration or annexation, which defined the controverted territory as Greer county, was passed by the legislature of the State of Texas. It is a pregnant fact that the border counties on the south side

of Greer had been defined by legislative enactments before the boundary commission met, and that this corner now claimed as belonging to the State was made the subject of a special act in 1860. True, it is contended that Clay embraced Greer when created out of Cooke, December 24, 1857 (art. 2664, Sayle's Early Laws), but the argument already presented as applying to the designation of Fannin as originally organized precludes this claim.

From 1860 to 1875 Greer county does not appear to have been subjected to much jurisdiction of any kind on the part of any power. Cols. Evans and Howe, Gen. Mackenzie, Maj. Clous, and the gallant, dashing, and lamented Custer have left traces of travel and conflict across its hills and down its vales; while, according to the testimony of Richardson and others, there was still a dispute between man and beast in regard to its occupancy, the wild buffalo being hunted and killed within its borders as late as 1882, and no white settler residing there until 1884.

In 1873–'4 Greer county was sectionized by Mr. Charles L. Du Bois, now a banker, residing in this city, without protest from the authorities of the State of Texas, although the governor of the State, and probably some of his staff, spent four or five days at the headquarters of the Government surveyor, while he was engaged in the work. (See ev. C. L. Du Bois, and also exhibits to deposition of James Edmunds, showing contracts with Commissioner of Indian Affairs for this work.)

The defendant's answer further insists that "the Congress of the United States, presumably with full knowledge of the situation and all the facts, on February 24, 1879, passed an act in which Greer county was recognized as rightfully belonging to Texas, and constituted a part of her domain" (pp. 22–23, Record). This defence was anticipated on page

22 of the amended bill filed in this cause, wherein it was insisted that the designation of Greer county as part of the northern judicial district of Texas was an act of inadvertence, was in no way intended, and cannot be lawfully construed as a cession of said disputed territory or an abandonment of the Government claim thereto, and was not so regarded or acted upon by the State of Texas. The bill was not discussed, but passed under a call for the previous question.

The law upon this point will be discussed elsewhere. We think a presentation of the facts right here will obviate any necessity of an extended discussion of the law.

That Texas did not regard this act in the serious light now contended for is made apparent by the act of her State legislature, approved May 2, 1882, in which she again sought a joint boundary commission to run and mark the line from the northeast corner of the State to the degree of longitude 100 west from London and 23 west from Washington.

This act provided that commissioners should "be guided by actual surveys and measurements, well-established marks, natural and artificial, and well-authenticated maps," the survey to be made between July 1st and October 1st, "when the ordinary stage of water in each fork of said Red River may be observed," and the main or principal Red River ascertained, and the point of its intersection with 100° west longitude fully designated, reference being made to the map of the treaty of 1819 in connection therewith. It was this same year that Col. Swisher sought to obtain a relinquishment of Greer county in behalf of the veterans, and, referring to that fact, Governor Roberts, in his message to the legislature already referred to, speaking of the expected legislation by Congress, says:

"In anticipation that our legislature, when convened in

special session, would take similar action, General Maxey, with whom I had communicated upon the subject, in January, 1882, introduced a bill in the Senate, making provision on the part of the United States for a joint commission, which was referred to and reported on favorably by the Committee on Territories. The bill passed in the Senate. In the House of Representatives a bill was referred to the Judiciary Committee, purporting to define the line by running up the North Fork. That committee reported against it, and submitted a very proper substitute for it, similar in effect to the bill that passed the Senate." (P. 107, Record.)

Now the Congressional records confirm Gov. Roberts in the opinion above quoted, and show why they refused to pass the act declaring the North Fork of Red River a part of the boundary line, and in so doing they sustain the allegation of the complainants bill in that regard. The following is the record:

"[H. R. 1715. Forty-seventh Congress, first session.]

"Mr. Wellborn introduced the following bill:

"A bill to define the boundary between the Indian Territory and the State of Texas.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the boundary between the Indian Territory and the State of Texas is as follows, to wit: Beginning at the southeast corner of said Indian Territory, in the middle of Red River; thence up said river to the junction of the Prairie-dog Town and North Forks of said river; thence up the middle of said North Fork to the one hundredth meridian west from London; thence crossing said North Fork by a line due north to the northeast corner of said State of Texas, as now established.

"SEC. 2. That the Government of the United States hereby disclaims any right or title to the lands situated south of the above-described line." (P. 128, Record.)

This bill was referred to the Judiciary Committee of the House of Representatives of the 47th Congress, first session, and House report No. 1282, from that body, contains an elaborate review of the history of this controversy; and they report, among other things, that "by an inadvertence, not singular in our legislative history, the United States by act of Congress approved Feb. 24th, 1879 (see 20 U. S. Stats., p. 318), included said county of Greer as a part of Texas, in the northern judicial district of that State, not annexing it for judicial purposes, but recognizing it apparently as an integral part of Texas," and the committee from their review reached the following conclusion:

"A careful review of the *facts* in the case—for the question as to which prong of the river is the true river is really a question of fact—your committee is decidedly of the opinion that the South Fork is the true boundary, and that therefore the claim of the State of Texas is unwarranted." (P. 131, Record.)

The report is published on pages 128–137, Record.

As a substitute for the proposition of Mr. Wellborn it was proposed to pass an act providing for boundary commissioners on the part of the United States to co-operate with the commissioners provided for by the Texas act above referred to in another effort to settle this dispute by joint commission. In January, 1885, such an act of Congress was passed. (See p. 136, Record).

As shown by the testimony of Mr. Sweet (x-QQ. 1 to 8), one other family besides his own had in April, 1884, taken up a residence in Greer county, they being the first white settlers, and about 40 families had settled there by July 1, '84.

It thus appears that it was 24 years after this territory was named Greer county before a white person settled in its borders.

President Arthur's Proclamation.

Even before the 40 families referred to by Mr. Sweet had taken up their residences, the President of the United States issued a proclamation warning all persons against intruding upon said territory, and asserted the right and title of the United States to the same. Nor did the complainant stop her assertion of jurisdiction by the issuance of this proclamation, but in June, 1884, Lieut. C. J. Crane, 24th U. S. Infantry, proceeded, under instructions, to notify Mr. Sweet and the other settlers that they must remove by October 1, 1884, and if found there after that time force would be used to remove them. (See pp. 150, 152, and 159, Record.) It appears that Gov. Ireland, in response to a letter from Mr. Sweet, advised that gentleman to remain and suffer himself to be put out at the point of the bayonet; to be careful to make an inventory of all property destroyed, and, if possible, get the names of all persons engaged in puting him out. (See ev. H. C. Sweet, x-Q. 6.)

It appears that Gov. Ireland then wrote to the President of the United States and the Secretary of War, as well as to the Secretary of the Interior, his letter to the latter being dated July 14, 1884. In it he refers to the order of removal to "the disputed claims of the United States and Texas to the territory;" argues the law in relation to removing intruders from Indian reservations; suggests that the two governments were on "the eve of an amicable adjustment of the respective claims," and requests a revocation of the order (pp. 153, 154, Record).

On September 5, 1884, the Hon. Richard Coke, U. S. Senator, wrote the Secretary of the Interior on the same subject, in which he urges that to carry out the order will work a great hardship and "be absolutely ruinous" to many; that the Government by revoking the order "can

suffer no detriment in its claim to the land;" and refers to the fact that the House of Representatives had passed a bill at the last session, which was then on the Senate calendar, and which, as already stated became a law the following January. (See pp. 155, 156, Record.)

On September 27, 1884, as a result of correspondence between the Interior and War Departments, based upon the requests of the governor and United States Senator from Texas, the Hon. Robert T. Lincoln, Secretary of War, directed a suspension of "the order of the President directing the removal of persons who have, contrary to law, gone into and settled upon lands situated in the southwestern portion of the Indian Territory, known as Greer county, Texas, *until further orders can be issued.*"

The next move in the direction of exercising and asserting jurisdiction was the organization of Greer into a county government at a meeting held at Mobeetie, Wheeler county, in July, 1886.

It will be remembered that the legislature only named this territory as Greer in February, 1860, just after the disagreement between the boundary commissioners of 1859, and more than a year before her own commissioner, Wm. H. Russell, had officially reported that disagreement. And now, as soon as any act of ownership is committed adverse to the title of the United States, and the strong arm of the Government asserts itself for the protection of her rights of property; when the highest officials of the State have pleaded, not in vain, that the Government will stay its threatened eviction, as her claims cannot be injured thereby; when that same Government, in the month of January, enacted a law looking to a trial of the question of territorial right, the State of Texas, instead of maintaining the *status quo* which she had invoked, encouraged others than the few settlers already there, not only to locate on

the controverted land, but actually permitted and recognized the formation of the local government above alluded to, and she now pleads that and subsequent acts of jurisdiction and authority on her part in bar of the Government's right to an assertion of that claim, which was to "suffer no detriment" by yielding "a great advantage to the people concerned."

Notwithstanding the foregoing history of the steps taken by the Government of the United States, the respondent in her answer to the complainant's bill, and in support of the plea in bar and estoppel, has pleaded that ever since the aforesaid organization of Greer county she has possessed civil government, caused public schools to be established, has established civil and criminal courts, enjoyed representation in the legislature of the State, and that "all these and many more acts of governmental control and ownership of said territory have been public, open and notorious, and well known to complainant, its officers, agents, and servants; yet, until the year 1887, complainant, by its silence, acquiesced in the settlement, etc.," until "on the 30th day of December, 1887, it pleased the President of the United States to issue his proclamation, without the authority of Congress therefor being first had and obtained, warning all persons from attempting to sell or buy any lands in Greer county, Texas, or from attempting to exercise any authority over said lands." (See p. 22, Record.)

Surely counsel for the State must have forgotten the Presidential proclamation of 1884 and the military invasion by Lieut. Crane long before any of the acts above cited and relied upon had been committed, or the allegation that the proclamation of December, 1887, was the first public declaration of title by the United States would never have been made; for this record shows that the senior counsel for the State, who, in 1887, was Attorney-General of the

United States, was himself the medium through whom the attention of the Government was called a second time to the fact that the State of Texas was by legislative enactment assuming jurisdiction and exercising authority over the land in said county.

It appears that on July 20, 1887, Mr. A. J. Meers, a resident of "Mangum, Greer Co., Indian Territory," wrote to the learned Attorney-General, calling attention to the fact that the land commissioner was about to sell one-half of Greer county "as school lands belonging to the State of Texas," and requesting that "the State of Texas be stopped from ejecting settlers from the territory."

On September 22, 1887, another resident of Greer, J. S. Weeks, wrote to the President himself, stating that there were then about 2,000 settlers there who had adopted the U. S. Government survey; that the land commissioner proposed a re-survey prior to sale of said lands, and asking the President "to stop, if possible, the attempt to survey and sell Greer by the State of Texas till the settlers can be heard before Congress" (p. 115, Record).

The communication to the Hon. A. H. Garland was referred by him to the Secretary of the Interior. It reached the Indian Division of the Interior Department December 23, 1887, and in just one week from that date the present Chief Executive, during his former Presidential term, issued the second warning protest, and assertion of right, title, and jurisdiction.

In the pleadings in this cause the name of the learned counsel who was then the President's own legal adviser appears first as sponsor for the implied charge of an usurpation of power in the issuance of this proclamation "without the authority of Congress therefor being first had and obtained." If it were an exercise of authority unwarranted by the Constitution, there was no excuse for its exercise,

because Congress was in session at the time. But, if the mere warning voice of the last proclamation is liable to this stricture, what must be the condemnation of the act of invasion in 1884, which the governor of the State advised Mr. Sweet only to yield to at the point of the bayonet? Recent events have demonstrated that the present Attorney-General of the United States does not hold to this view of national effeminacy when the property of the Government is seized or endangered by the lawless or destructive elements of society; and the almost universal approval of Mr. Cleveland's latest proclamation and exercise of military power in the preservation of public rights and property must be a pleasant panacea for any pain produced by the reflection cast upon his conduct in the case at bar.

Ex-Gov. L. S. Ross, now about 56 years of age, testifies that he has had a historical knowledge of this conflict of claims ever since he could read a history of his State (p. 960, Record).

It will be borne in mind that the boundary commission provided for under the act of Congress of January, 1885, commenced its sessions the following year, and dissolved, without reaching an agreement, on July 16th of that year.

It appears that before the President's proclamation was issued in December, '87, the officials of the State of Texas were cognizant of the fact that the Government of the United States was contemplating action on its part on account of the action of the State looking to a sale or lease of the Greer county lands. On September 8, '87, the Hon. R. M. Hall, commissioner of the general land office of Texas, hesitated about carrying out the land law of 1887, and sought the advice of the then Attorney-General, who is the present governor of that State, as to his authority in the premises, to which the Attorney-General replied on September 13th, asserting the title of Texas to the ter-

ritory, and as an inducement to persons to purchase the land the Attorney-General says that the State "is fully able and willing in every way to defend her claim to it, and out of public policy, as well as from principles of justice, to hold her vendees harmless to the last dollar which she may receive for the sales to them, and to refund to all her lessees every cent that may be recovered from them by any power on account of their possession of these lands under her" (p. 114, Record).

Thus it appears that this assertion of a purpose to sell or lease these lands was made a few months subsequent to the second effort at an agreement by a commission, and that the proposed action was immediately resented by the Government.

On October 28, 1887, it reached the ears of the Hon. L. S. Ross, then governor of the State, that the Secretary of the Interior, in view of this purpose to sell these lands, had again been called upon "to cause the removal of all settlers from that county," and like his predecessor, Gov. Ireland, *he* called upon the President (through Representative R. H. Crane) asking "that this department await the action of Congress in the premises." Mr. Crane thereupon submitted the governor's communication to the President with the request "that executive action be suspended until the question of proprietorship of the disputed territory shall have been settled either by act of Congress or by judicial decree under congressional sanction" (see p. 115–116, Record).

No action was taken beyond the issuance of the proclamation of December 30, 1887.

Post-Offices in Texas.

Another ground of estoppel is set up in the plea that prior to the proclamation of 1887 "the Executive Depart-

ment of the Government of the United States has established and maintained post-offices and post-roads in said county," and has designated them "as lying in Greer county, Texas, and not as lying in the territory allotted to the Indians" (p. 22, Record).

This circumstance was met and explained in the amended bill upon which this issue is being tried (p. 38, Record), and the facts there alleged are fully sustained by the evidence of Geo. F. Stone and P. H. Bristoe, of the United States Post-Office Department, together with certified records of that department (pp. 212–223, Record) from which it appears that a number of persons in 1885, designating themselves as "citizens of Greer county, Texas," petitioned for the establishment of a post-office. The postmaster at Doans, Texas, approved the petition; the member of Congress appears to have asked favorable consideration thereof. One was established some time in March, 1886, and another in June of the same year; but in December, 1886, they were assigned to the Indian Territory, and have been so officially known ever since; while all post-offices and routes therein established since that date have been and are still carried as Indian Territory routes (see G. F. Stone, Q. 8). Mr. Sweet, at Mangum, who claimed nearly 20,000 acres of the land under Texas laws, sought to avoid this change of designation, but failed, and executed a new bond as required by the Post-Office Department (see his letter and x-QQ. 23–28, in which he admits that after having refused to execute such new bond he finally yielded and did execute it.)

It appear, too, that the Hon. S. W. T. Lanham, M. C., endorsed the letter of Mr. Sweet, and called attention to the fact that the dispute as to this territory had been pending for years, and he did "not think any action of the Post-Office Department will prejudice either claim."

Notwithstanding this abundant testimony that the several acts referred to were mere errors, growing out of want of information on the part of subordinate officials of the Post-Office Department, ignoring the fact that for 10 years past the Government has only refrained from the exercise of authority in response to the pleadings of the highest officials of the State of Texas, and in the face of declarations reiterated that the nation's generosity could not prejudice the nation's right, they are each and all now pleaded in bar of the rights so long asserted and now claimed.

The Federal Courts.

Another allegation in support of this plea is that after the passage of the judicial act of 1879 the Federal court for the northern judicial district of Texas has exercised jurisdiction over Greer county (pp. 22–23, Record).

No evidence has been introduced by respondent to support this pleading; but the complainant, in order to meet the allegation, examined Hon. Andrew Phelps McCormick, at that time the circuit judge, and now one of the judges of the U. S. circuit court of appeals. His testimony shows the trial of two criminal cases in the year 1889; one the case of Jim Ligon, and the other of F. L. Davidson and others. In the first-named case the accused was convicted, but a new trial was granted upon the ground that the original larceny was committed in Wheeler county, Texas, but the indictment was endorsed for "larceny of cattle in the Indian Territory." The cattle were asported into and through Greer county, and the arrest was made north of Greer county, in the Kiowa country; and the judge declares his action in the case was because "comity between the jurisdictions did not require the courts of the United States to entertain jurisdiction, although the defendant was found

in the possession of the property at a point clearly within the exclusive jurisdiction of the United States courts" (QQ. 5, 9, 10, 15, 17).

In the Davidson case the original taking was in Greer, and the accused was arrested with the cattle in possession in the Kiowa country north of Greer (Q. 20). It was sought for the defence in this case to apply the action in Ligon's case in behalf of the accused, but there was "no comity of jurisdictions;" and since the court had jurisdiction through asportation into its undisputed territory, the court refused its sanction to the proposition that Greer county was a part of the State of Texas. Judge McCormick says:

"25th answer. I remember that in some way the counsel for the defendant was during the trial invoking the authority of my ruling in the Jim Ligon case, heretofore referred to in this deposition, and I announced that he need not expect me in this case to decide that Greer county was a part of the State of Texas, and on that ground to deny the jurisdiction of the United States court to punish for theft of cattle as charged in this indictment, and I charged the jury, in substance, that if the proof showed the larceny as charged in the indictment they should find the defendant guilty."

"Answer to 3d cross-int'y. If the proof had shown the original caption to have been on the undisputed territory of the State of Texas, with my view of the law as announced in Ligon's motion for a new trial, above referred to, I would have charged the jury in this case that the United States court would not take jurisdiction, and have directed a verdict for defendants. As the proof showed a continuous caption up to a point clearly within the jurisdiction of the United States court and the original caption to have been on the disputed territory, I charged the jury with reference to the proof of the offence and without any reference to the jurisdiction of the court." (Pp. 346–347, Record.)

The most convincing proof, however, that the State of

Texas, even since the organization of Greer as a county, has not exercised the same jurisdiction that she has over all undisputed territory, appears from the fact that for nearly 10 years past the lands of that county have not been subject to assessment for taxation, Mr. Sweet being the only landholder whose holdings are assessed, and in his case it being done at his own demand. The State comptroller, Mr. Jno. D. McCall, testifies that in 1892, out of an assessed valuation in Greer upon $1,179,286, only 1,800 acres of land and $3,400 in value of town lots were included in that assessment, while Mr. J. H. Simpson, the assessor for Greer county for 1891–'92, says that he did not assess the lands in Greer "because of this county being in litigation, the United States claiming it and Texas claiming it; we could not make any purchases of land here, owing to no legal files being made, and the comptroller of the State of Texas did not require it" (Q. 8). The male adult population between the ages of 21 and 60 numbered 2,189; between 1,100 and 1,200 farms were in cultivation; there were about 55,000 head of cattle and 11,117 horses in the county (QQ. 9, 14, 17, 18).

Can there be any other reason assigned for the non-taxation of over 1,000,000 acres of agricultural land except the knowledge that the powers of the Federal court might be invoked to restrain its collection, and a permanent injunction would be less preferable to a voluntary surrender pending the contest?

Indeed they were so invoked, and an injunction awarded by the United States judge to restrain the levy and collection of taxes from "The Franklyn and Day Land and Cattle Co." has remained in force to this day. (See ev. of Gov. Ross, p. 960, Record.)

Land Certificates.

It has been urged that land certificates were located in Greer county; but this, we insist, cannot be considered as an

exercise of jurisdiction, while the subsequent act of issuing patents might be. But was this ever done *bona fide?* It does not so appear. The only patents ever issued, except Col. Swisher's (Rd. Q. 6), were issued in 1884, were upon locations made by the Day Land and Cattle Co. upon suggestions from Col. J. M. Swisher (see evidence of Chas. E. Anderson, x-QQ. 6, 7), and these were all cancelled by the State in 1887.

It does appear from the testimony of Mr. Pressler that the H. and T. C. R.R. Co. located 400 sections of land in 1857 in part of the territory west of Melish's meridian, but the governor refused to sign the patents because "they were not made in Texas." Mr. Pressler further testifies that after an examination for the record of the earliest survey in Greer county he finds its date to be June 20, 1882 (x-Q. 149).

We have before remarked upon the failure to produce any evidence of surveys by official surveyors within the limits of Greer county, and Mr. Pressler admits that in surveying all other sections of the State bordering on rivers surveyors have gone on both sides of the stream, but when they reached Prairie Dog River, up to the year 1883, they went along the west line of Greer. He testifies in that regard as follows:

"194 x-Q. In surveying the northwestern territory bordering on Red River and the 100th meridian, do you know of the surveyors ever having crossed the meridian line to the east, or the South Fork of Red River to the north, in making their surveys?

"A. Except as shown on the map of Greer county, I do not know of any others.

"195 x-Q. And when was the map of Greer county made?

"A. December 18, 1883.

"196 x-Q. Do you know of any other instance in which

the surveyors in surveying territory have failed to cross a stream and survey on both sides when the territory on both sides is in the State of Texas?

"A. Well, before that time they have surveyed along the west line of Greer county.

"197 x-Q. But my question has reference to other parts of the State when I ask you if the surveyors have not invariably surveyed on both sides of the stream where the territory on each side was undoubtedly Texas territory.

"A. Yes, sir; they have surveyed on both sides then."

The Day Land and Cattle Co. certificates were like Col. Swisher's "donation certificates" (Rd. QQ. 95–97).

Mr. Chas. Goodnight, the owner of 60,000 acres on the west side of Greer, in answer to the last general interrogatory, says:

"I know that that country was not surveyed until in late years, because it was supposed to be out of the State of Texas. I think that is a well-established fact. It was blank land when I came in here 13 or 14 years ago. The reason why it was not surveyed is because it was supposed to belong to the Nation. That is my understanding."

We might, but it is useless, go through this record and show many other evidences in support of our position, that since Mr. Marcy's *terra incognita* received any attention on the part of either the United States or the State of Texas, both those governments have been contending for the ownership of the land; and that there has not been, and could not be, any bar to a judicial settlement of this controversy against either the Federal or State governments, save by an actual and intentional cession by the one to the other of its title thereto. This we claim under the treaties and act of annexation of Texas, which will be treated in a note upon the law of this case.

When this cause had been pending more than two years and a half, and the case practically made out as to the issues heretofore discussed, the State of Texas instructed one Prof. Pritchett to test the accuracy of the particular point of the boundary in controversy where Jones and Brown, in 1857, marked the intersection of 100° west longitude with Red River. His instructions were, among other things, not to make known to others the purpose or result of his labors. (See letter, p. 1210, Record.) His report of the fixation of that meridian, and the methods adopted by him in reaching his conclusions, are made part of his deposition. The limit of his observations will be found in x QQ. 20–25. The result of this observation and determination is shown by the witness in his statement that the initial monument of Jones and Brown is placed 3,797.3 feet west of the point of determination ascertained by Prof. Pritchett. In other words, the monument should, according to this claim, be placed something less than three-quarters of a mile east of its present location.

The object of this attack upon the correctness of the location of this monument appears to be a partial saving point for the State of Texas in the event the chief issues shall be decided against her, but we think the contention does not reach the merit even of a somewhat analogous position taken by the State of Virginia in the recent case of Virginia *v.* Tenn. (143 U. S. Reports). In that case it was complained that ignorant or interested surveyors had *deviated from a long-established line*, and that portions of the original boundary marks agreed upon by compact had become obliterated by decay and time. In regard to this boundary there can be no such contention. The testimony in this case not only shows the easy location of the monu-

ments both on the North and South Forks of Red River, but the eastern line of the Pan Handle of Texas is clearly recognized and defined by the surveys of the defendant's own surveyors.

It is a plea pure and simple that in any event the State of Texas is entitled to have this line run now, under an order from this court, so as to determine what (it is claimed) has never been fixed by any tribunal competent to bind both parties to this cause.

We need not question the correctness of Prof. Pritchett's results. Our defence to this plea rests upon other grounds, and, we think, well-established legal principles.

There is, however, much evidence in this record to lead the court to hesitate before adopting the conclusions of this witness, who, single handed, performed his duty under his contract.

First. The survey made by Jones and Brown, and their report and field-notes of the establishment of this meridian, was all done under auspices the most favorable to correct results. It has the endorsement under oath of the assistant surveyors, and the corps of laborers accompanying them; the faithfulness of the work performed is attested by Daniel G. Major, astronomer and examiner of surveys; it was verified by observations extending over a period of several months, under the provisions made by Congress for establishing this identical boundary in the year 1859–'60, the work of the United States being performed under the leadership of Jno. H. Clarke, who retraced the work of Jones and Brown and prolonged this line from the parallel of 36° 30′ north latitude up to the southern boundary of Kansas, at which point he ascertained that the boundary of this meridian on the Kansas border was 1,700 feet farther west than the line established between Texas and the Indian Territory. (See p. 71, Record.) And while it is true that the

commission dissolved without having jointly agreed upon which fork should be the boundary, still the report of Mr. Wm. H. Russell, the Texas commissioner, to the governor of the State, on April 2, 1861, asserts that "the 100° of west longitude may be regarded as one of the most accurately established points in any of the interior surveys," and that the western boundary of Texas—the meridian of 103°—was based upon the same calculations as that of 100°; that he determined to accept this 100th meridian, and traced it himself from the Canadian River to the North Fork, where he found the United States monument coinciding with his own work, thus covering about two-thirds of the distance of this disputed meridian. He was assisted by a corps of seventeen men (pp. 102–'4, Record). From that time to the present—a period of 35 years—this line appears to have been recognized by both parties to this controversy. Prof. Pritchett says it was this recognition by government surveyors of Texas that enabled him to locate the point for the observations made by him as set forth in his report. And it could not be otherwise, for the act of February 8, 1860, made that line the western boundary of the county of Greer.

Prof. Pritchett says in his cross-examination that "the testimony of the surveyors who have *used that as a reference line* for years was uniform—that this monument had remained undisturbed. And, at all events, for all the time during which surveys of the country have been in progress, it has been assumed to be the initial monument as determined by the expedition of 1857, so that every evidence that it had remained undisturbed was there. On page 1204, Record, he says:

"Q. Was your attention called in any way to the investigation of the genuineness of the location of the monument which you saw?

"A. It was not, for the reason there could be in my mind

no reasonable doubt whatsoever that this monument was the monument fixed by the former expedition; and it is certainly true that it does mark the line which *has always been accepted, and is now accepted*, as that of the 100th meridian.

"Q. May I ask how you know that?

"WITNESS. How I know that it is the line which is accepted as the 100th meridian?

"Q. Yes; how you know that that is the monument which marks the line which has always been accepted?

"A. I know it is the monument which marks the line accepted, for the surveys all start from it *as the 100th meridian.*

"A. It was pointed out to me by the surveyor and others living there."

CHAS. E. ANDERSON shows that from interested motives, in the year 1888 or 1889, his firm employed surveyors to assail this very meridian line, in the hope of being able to locate certificates if the line was found to be incorrect; but that the report of the engineers showed a variation of only about 200 yards. He testifies as follows:

"Q. Did the Day Land & Cattle Company ever have a survey and astronomical observations made, in order to ascertain the true location of the one hundredth meridian of longitude? If so, when and by whom were they made?

"A. The Day Land & Cattle Co. did not; Maddox Bros. & Anderson, the firm to which I belong, did, and in December, 1888 or 1889, during Christmas week.

"Q. Why were these surveys and observations made by the firm of Maddox Bros. & Anderson?

"A. We believed that the hundredth meridian was a mile and a half to two and a half further east than where the landmarks show it to have been formerly established. Our reason for attempting to locate the true position was, if it was further east, as thought by us, that the territory between the monuments as now located and the place where we believed it would go would be unreserved public domain of the State, and therefore subject to location of land certificates.

"Q. How did that survey and those observations compare with reference to the location of the one hundredth meridian as shown by the monuments?

"A. The report made by the engineers in charge showed that the one hundredth meridian was very near the line as formerly marked, inside of two hundred yards."

Mr. CHAS. CORNER did not make actual but comparative observations, and shows a practical coincidence (x-QQ. 39–44), and in answer to x-Q. 45 shows it as a common experience that different persons will reach different results in work of this character, though "no important errors should occur," where the observations are directed to the stars, and observatory telescopes with transit attachments are used.

In answer to r. d. Q. No. 22, however, Mr. Corner explains this discrepancy by showing that 100° west from Greenwich would be equal to 23° 15″ west from Washington, which might account for a greater discrepancy than is claimed.

J. G. BOGARD, surveyor of Greer, has surveyed from the monument on North Fork down the 100th meridian to the second correction line; does not know of this line ever being questioned by the State authorities (Q. 4).

A. J. MEERS, county surveyor of Greer, officially recognized this line "by stones and monuments agreed upon by all parties concerned as the 100th meridian" (QQ. 21–23).

FRANK M. MADDOX helped to make the observations referred to by the witness Anderson, with chronometer, transits, sextants, etc., and he says:

"A. My name is Frank M. Maddox, and I reside at Austin, Travis county, Texas.

"Q. Are you a member of the firm of Maddox Bros. & Anderson?

"A. I am.

"Q. Did you, on behalf of that firm, participate in mak-

ing a survey and astronomical observations in order to ascertain the location of the one hundredth meridian of longitude west from Greenwich; if so, where, when, and who were with you, and how did you make this survey and observations?

"A. I did, in December, 1889, at Higgins, Texas; J. F. Pope, of Austin, Texas, and a man by the name of Richter, from St. Louis, Mo. I do not remember his initials. He was from the Washington university. We had a chronometer, two transits, two sextants, and mercury, etc., necessary to making such survey and observations. We went to the one hundredth meridian as established by Jones & Brown in 1857, and ran a transit line from there to Higgins, carefully chaining the same a distance of a few feet short of a mile. We took observations on the sun and different stars during a period of four days and nights. We got our time from the Washington University, at St. Louis, at 10 o'clock each day.

"Q. What was the result of this survey and the observations of your party with reference to the location of the one hundredth meridian of longitude west as established and marked by Jones & Brown in 1857?

"A. Our calculation showed that that line was properly established. My recollection is that that survey was about 200 feet too far east. I will state that the astronomers did not know, neither before or after making the observations, what my object was for having it done. My instructions to them was to give me the true longitude and latitude of the depot at the town of Higgins.

"Q. What did the astronomers say to you with regard to the location of the one hundredth meridian as established by Jones & Brown?

"(The State of Texas objects to any declaration as called for in the foregoing question because the same would be hearsay.)

"A. They said to me verbally, and in their written report to the firm, that it was absolutely correctly located."

J. C. SETTLES says the monument marks the recognized

boundary between Greer on the west and the base of the Pan Handle (x-Q. 16).

THE LAW OF THE CASE.

But few questions of law can arise in this case. It is almost purely determinable upon the facts. The point of long acquiescence is met by testimony showing a continuous dual claim ever since the parties learned the true state of the country and ascertained facts giving rise to dispute.

The oral testimony upon the early nomenclature of streams, the physical features of the country, and recognition of boundaries by the respective parties is subject to the criticism placed by this court upon similar evidence in the case of Indiana *v.* Kentucky, where the court says:

"The testimony of the witnesses introduced by the State of Kentucky consisted to a great extent of recollections, which must, of necessity, have been more or less imperfect" (136 U. S. 517).

The supreme court of Texas has frequently recognized the same rule. In 29 Texas, 318, it says: "Hearsay evidence is admissible to prove ancient boundaries, but it should be closely scrutinized and not admitted if it be vague and uncertain." And in Stroud *v.* Springfield (28 Texas, 650) the court holds that "such evidence as to common rumor must be general and concurrent, and must have been formed before the controversy began."

The conclusion must be reached in this case as in Indiana *v.* Kentucky—that "the question then becomes one of fact," and that "above all the evidence of former transactions and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of" (the United States. *Id.* 509.) They are:

The absolute desert and barbarous state of the unexplored region at the date of the treaty.

The intention of the parties to form a boundary running westward and much farther south than the United States now claims.

The act of the Texas legislature in 1850 removing all doubt as to the true meridian being the boundary.

The acquiescence of Texas in the organization of Kansas and Colorado.

The recognition by Mexico, Coahuila, and Texas, the Republic and State of Texas of the boundary of the Cameron grant.

The acknowledgment that the treaty map erroneously laid down the upper waters of the Canadian as Red River of Natchitoches.

The fact that from the date of the treaty to the present time all maps have laid down the main Red River more nearly in accord with the direction of the stream claimed by the United States as the boundary (p. 1000, Record).

The recognition by Texas officials in the land office of the South Fork as the boundary.

The fact that a part of the South Fork as delineated on the treaty map coincides with the South Fork west of the confluence of the two streams, while the North Fork appears there as an unnamed tributary.

Seen and Unseen.

"In unforeseen cases—that is to say, when the state of things happens to be such as the author of a deed has not foreseen and could not have thought of—we should rather be guided by his intention than by his words, and interpret the instrument as he himself would interpret it if he were on the spot, or conformably to what he would have done if he had foreseen the circumstances which are at present known." (Vattel's Law of Nations, p. 262.)

The Jones and Brown Meridian.

The correctness of the line marked by Jones and Brown and accepted by the commissioners is not made an issue in the pleadings, but testimony is offered on that point.

The legal effect of the work of the boundary commission of 1859, so far as the fixedness of the line of the 100th meridian is concerned, we insist, amounts to an agreement of both parties to this cause accepting so much of the controversy as settled. It is analogous to the position of the parties in R. I. *v.* Mass. (4 How. 591), when, in 1710, Rhode Island, through her agent, "agreed that the stake set up by Woodward and Saffrey in 1642 should be considered as the commencement of the line." Though she subsequently sought to show that she acted under a mistake of fact, still this court held the agreement to be binding.

In the case under consideration the knowledge or opportunities and duty of knowing are fully apparent. Mr. Russell was the Texan commissioner appointed for that specific object. He describes in his report the means by which he reached his conclusion that "the 100° of longitude as established is correct" (p. 102, Record). He accepted this point as established, because there could possibly be no doubt of its correctness, as the observations were made with a very costly zenith telescope for the space of near one week (p. 103, Record).

The court, in R. I. *v.* Mass., express a doubt whether a court of equity "could relieve against a mistake committed by so high an agency in a recent occurrence," and says: "It is certain that it could not, except on the *clearest proof* of mistake." (*Id.*, 634.)

The third article of the treaty calls for the meridian of 100° west from Greenwich and 23° west from Washington. These points are not identical. Washington, as

shown by Mr. Corner, is 77° no minutes and 15″ west from Greenwich (p. 1389, Record.) This discrepancy, according to defendant's expert witness, involves twice the distance westward to the distance claimed as error, and it may be that this equitable division was made by the surveyors in establishing the line. If not, it would have to be made now, and the result would be the same.

There has never been a suggestion from 1857 until 1893 that there was any error in that line, and it is presented to the court now upon the evidence of a single witness, to set up an issue not raised by the pleadings in the cause.

Referring to the effect of the agreement of 1850, this court has said:

"Congress, by an act of September 9, 1850, 9 Stat. 446, c. 49, made certain propositions to Texas, one of which was that its boundary on the north should commence at the point where the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and run from that point due west to the meridian of one hundred and three degrees; thence due south to the thirty-second degree of north latitude; thence on the latter parallel to the Rio Bravo del Norte, and thence with the channel of that river to the Gulf of Mexico. This proposition was accepted by Texas. (Oldham and White's Digest Laws of Texas, p. 55.) By the same act, section 2, the eastern boundary of New Mexico was established on the one hundred and third meridian. *The remaining territory of Texas, as it was when admitted into the Union, passed by that act under the jurisdiction of the United States.* The territory of Kansas was organized by the act of May 30, 1854, c. 54, section 19, 10 Stat. 277, 283, its southern line being fixed on the 37th parallel of north latitude. The territory of Colorado was organized by an act approved February 28, 1861, 12 Stat., 172, c. 59, its eastern boundary being on the 102d meridian, and its southern boundary being on the 37th parallel of north latitude. (*Ib.*, section 1.) The result of all

these enactments was that the body of public lands known as the Public Land Strip was left outside of Texas, as well as of the Territories of New Mexico, Kansas, and Colorado." (Cook *v.* U. S., 138 U. S. 156.)

Effect of the Judiciary Act of 1879 as Operating an Estoppel.

If the act of Congress in question has any bearing on the question of title to and sovereignty over the disputed land, then the purpose and scope of that act was far beyond what its title or text indicated. Certainly one not familiar with the history of this controversy would never imagine, upon reading it, that it expressed, *intended*, or was capable of the construction that it was a cession or conveyance of 1,517,000 acres of land pure and simple, without consideration, or that it was a quitclaim to that which had been the subject of contention for years. Such *intention* is asserted in the pleadings here, and it follows from that conclusion that the act is regarded as auxiliary to the ambiguous treaty. We may consider the question, therefore, according to the principles which govern the construction of treaties.

First. "It is not allowable to interpret what has no need of interpretation. * * * When its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents." (Vattel's Law of Nations, § 245.)

The argument of the State of Texas is that this act clearly recognizes Greer county as an integral part of the State. Let us admit the proposition. Was it by mutual understanding of the parties an integral part of Texas before that act? No one here so claims. Then was it intended by the act to make it such? Such a conclusion is more than insulting to the legislative intelligence,—it casts a stigma upon its purity or patriotism. Congress has "*the*

power to dispose of the territory or other property belonging to the United States" by virtue of the Constitution, but its vestiture with that power was predicated upon the belief that Congress, as representing all the States of the Union, could be trusted "to make a proper use of it,—not to dispose of it without good reasons, nor to alienate it but for a *manifest public* advantage." And when this power of disposal is exercised we are told that "she ought not to dispose of them except in a manner that is consistent with the duties which the body owes to its members." (*Id.* § 117.)

Now, we are asked to interpret an act which declares one specific object, contemplated by the Constitution and essential to the public welfare, as embracing another and different purpose or effect, which is in direct contravention of the proper exercise of that power. And that, too, in the face of the treaty provision for the continued exercise of jurisdiction over any territory where already exercised, until a final determination of boundaries.

Second. If we admit the possibility that the act in question could have contemplated a surrender without any equivalent, of this vast domain, we may be aided in endeavoring to ascertain that intention by looking to other acts and utterances of the parties. The same authority lays down these rules:

"In the interpretation of a treaty, or of any other deed whatsoever, the question is to discover what the contracting parties have agreed upon—to determine precisely on any particular occasion what has been promised or accepted; that is to say, not only what one of the parties intended to promise, but also what the other must reasonably and candidly have supposed to be promised to him—what has been sufficiently declared to him and what must have influenced him in his acceptance. Every deed, therefore, and every

treaty must be interpreted by certain fixed rules, calculated to determine its meaning as naturally understood by the parties concerned at the time when the deed was drawn up and accepted." * * * (*Id.*, p. 246.)

"Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed, whenever we meet with any obscurity in it we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly. This is the general rule for all interpretations." (*Id.*, p. 247.)

"In the interpretations of treaties, compacts, and promises we ought not to deviate from the common use of the language, unless we have very strong reasons for it." (*Id.*, p. 248.) * * * "It is then a gross quibble to affix a particular sense to a word in order to elude the true sense of the entire expression." (*Id.*, p. 249.)

"Every interpretation that leads to an absurdity ought to be rejected." (*Id.*, p. 252.)

"If he who has expressed himself in an obscure or equivocal manner has spoken elsewhere more clearly on the same subject, he is the best interpreter of his own words. We ought to interpret his obscure or equivocal expressions in such a manner that they may agree with those clear and unequivocal terms which he has elsewhere used, either in the same deed or on some other similar occasion. In fact, while we have no proof that a man has changed his mind or manner of thinking, it is presumed that his thoughts have been the same on similar occasions, so that if he has anywhere clearly shown his intention with respect to a certain thing, we ought to affix the same meaning to what he has elsewhere obscurely said on the same subject." (*Id.*, p. 254.)

"The reason of the law or of the treaty—that is to say, the motives which led to the making of it, and the object in contemplation at the time—is the most certain clue to lead us to the discovery of its true meaning, and great attention should be paid to this circumstance whenever there is question either of explaining an obscure, ambiguous, indeterminate passage in a law or treaty, or of applying it to

a particular case. When once we certainly know the reason which alone has determined the will of the person speaking, we ought to interpret and apply his words in a manner suitable to that reason alone. Otherwise he will be made to speak and act contrary to his intention and in opposition to his own views." (*Id.*, p. 256.)

"We are not to presume, without very strong reasons, that one of the contracting parties intended to favor the other to his own prejudice; but there is no danger in extending what is for common advantage. If, therefore, it happens that the contracting parties have not made known their will with sufficient clearness, and with all the necessary precision, it is certainly more conformable to equity to seek for that will in the sense most favorable to equality and the common advantage than to suppose it in a contrary sense."

"For the same reason everything that is not for the common advantage, everything that tends to destroy the equality of a contract, everything that onerates only one of the parties, or that onerates the one more than the other, is odious." (*Id.*, p. 264.)

"When the question relates to things favorable, we ought to give the terms the utmost latitude of which they are susceptible according to the common usage of the language; and if a term has more than one signification, the most extensive meaning is to be preferred; for equity ought to be the rule of conduct with all mankind wherever a perfect right is not exactly determined and known in its precise extent." * * * "Now, when there is question of favorable things, the more extensive signification of the terms accords better with equity than the more confined signification." (*Id.*, pp. 266, 267.)

"We should, when there is question of odious things, interpret the terms in the most limited sense; we may even, to a certain degree, adopt a figurative meaning, in order to avert the oppressive consequences of the proper and literal sense, or anything of an odious nature, which it would involve; for we are to favor equity and do away with everything odious as far as can be accomplished without going in direct opposition to the tenor of the instrument or visibly wresting the text." (*Id.*, p. 268.)

Our aids in applying the rules quoted to the case under consideration are found in profusion throughout the record before us. They consist, first, of the fact that under the colonial grants and in the official records of the Texas land office that stream has been regarded as the boundary which makes Greer county a part of the public domain of the United States. Second, the Government of the United States has claimed this territory as hers from the first moment of time that she obtained an intelligible account touching the country. Third, no presumption arises from the language of the act of 1879 of a purpose to abandon the claim to ownership of the land. Fourth, the State of Texas does not appear to have regarded or acted upon the law referred to, as having any broader scope and wider purpose than was consistent with an acknowledgment that the dispute as to ownership remained unadjudicated. Fifth, the Congress of the United States has declared the act to be an inadvertence, and the intent to give this territory to the State of Texas is denied.

The maxim that "it is not allowable to interpret what has no need of interpretation" finds no place in considering the true meaning and effect of the act of Congress to organize a United States court for the northern judicial district of Texas. When it is sought to construe that act also as abandoning this valuable claim, without a line to indicate any such purpose, the fullest extent to which criticism could go as to the meaning of the said act of Congress would be, we insist, to declare it necessary, if possible, to ascertain the understanding of the parties at the time, from evidence outside of the language of the act itself.

"Not only that which the person promising had in his mind, but also that which has been sufficiently declared—that which both the contracting parties must reasonably

have understood," because "good faith adheres to the intention; fraud insists on the terms when it thinks they can furnish a cloak for its prevarications." (Vattel, p. 259.) And this is especially true in regard to the interpretation of a legislative enactment relating to the public domain, for in such cases "a restrictive interpretation is then also used, and we except the case in question, agreeably to the intention of the legislature or of him who made the promise, for the legislature intends only what is just and equitable, and in contracts no one can enter into such engagements in favor of another as shall essentially supersede the duty he owes to himself." (*Id.*, pp. 259–260.)

It will be observed that the plea in this behalf does not assert or claim that the State of Texas, *at the time* the act was framed and passed, understood that it was intended to bear upon the question of the conflicting claims to this territory. The record in this case is silent upon that point because the records of Congress are silent, and the Representatives of the State who obtained the legislation are kept aloof from all utterance on the subject. The contention is that the legislature is presumed to have acted with full knowledge; but whether it did so is made an issue by its own declaration that it was an inadvertence. This controversy, the ordering of this suit by Congress, arises in part so that "the precise point of *the will* of the legislature or the contracting parties" may be determined.

Under the practice of the State of Texas this plea would be fatal upon demurrer because it does not set up or allege any consideration for the release relied upon. (Peters *v.* Clements, 52 Tex. 140.)

Waiving that point, however, it cannot be denied that to declare Greer county as surrendered to Texas by the act referred to, it must be upon an implication and without any expression to that effect; and in such a case the presumption must be treated "according to the laws of equity and reason." Let us see how this rule is to be applied.

"We are not to presume, without very strong reasons, that one of the contracting parties intended to favor the other to his own prejudice." We must seek for the will of the parties "in the sense most favorable to equality and the common advantage. * * * Upon this principle, that we ought in case of doubt to extend what leads to equality, and restrict what destroys it, is founded that well-known rule—*Incommoda vitantis melior quam commoda petentis est causa*—the party who endeavors to avoid a loss has a better cause to support than he who aims at obtaining an advantage." (*Id.*, p. 264.)

One other principle may be applied. On the day the act of 1879 was passed each party claimed title to the land. Neither may be said to be actually possessed, for as yet no settlers were located there. The last preceding act of authority over it was the survey and sectionizing done by Mr. Dubois, under contract with the Indian Department, from 1875 to 1877. So the complainant was certainly exercising possessory power. The principle applicable from this condition is:

"Whatever tends to change the present state of things is to be ranked in the class of odious things; for the proprietor cannot be deprived of his right, except so far, precisely, as he relinquishes it on his part; and, in case of doubt, the presumption is in favor of the possessor."

This honorable court has but recently passed upon this interesting question of its rule of construing a Congressional enactment, and clearly declines to assume that Congress deliberately directed an illegal proceeding, where the act in controversy, taken in connection with its prior act, *in pari materia;* to the acts and proceedings of the Secretary of the Interior, the Commissioner of the General Land Office and other executive officers, lead to a different conclusion as to its intention. (*U. S.* v. *Dalles Military Road Co.*, 140 U. S., pp. 631, 632.)

In the case just cited the Attorney-General was directed to commence suits in equity to set aside certain land grants made to the State of Oregon. Various pleas, such as laches, stale claim, estoppel, the certificates of the governor and allegations of *bona fide* purchase, were interposed. Issue was joined upon these pleas and judgment thereon was for the defendants and the bills were ordered to be dismissed. On appeals to this court it is held that—

"An assertion that the claim of the United States is a stale claim is an assertion that Congress deliberately directed suits to be brought upon a stale claim. If laches be a good defence it must be declared that Congress directed suits which would be defeated by showing prior delays by Congress." (*Ibid.*, 632.)

Applying the rule that "the intention of the legislature may be found from the act itself, from other acts *in pari materia*, and sometimes from the cause or necessity of the statute, and wherever the intent can be discovered it should be followed with reason and discretion" (Dwarris, p. 144), then the act in question cannot be construed as a cession of territory, Chief Justice Taney, in Brewer *v.* Blougher (14 Pet. 197), laid down that—

"The best rule of interpretation to be adopted by the courts is to ascertain the meaning of the legislature from the words used in a statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if satisfied that the literal meaning would extend it to cases which the legislature never designed to include."

It may be admitted that the words of the statute might, if such were the intention of the parties, have accomplished two objects, both the establishment of a judicial tribunal

and a settlement of the Greer county controversy, but where there is doubt—

"The intention of the legislature is to be resorted to in order to find the meaning of the words. That meaning may be extended beyond the precise words used in the law from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed." (*U. S.* v. *Freeman*, 3 How. 565.)

In Mr. Endlich's new but excellent work on interpretation of statutes the author, discussing presumptions as to legislative intent, says:

"Before adopting any proposed construction of a passage susceptible of more than one meaning it is important to consider the effect or consequences which would result from it, for they often point out the genuine meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is to be avoided. It is found sometimes necessary to depart, not only from the primary and literal meaning of the words, but also from the rules of grammatical construction, when it is improbable that they express the real intention of the legislature; it being more reasonable to hold that the legislature expressed its intention in a slovenly manner than that it intended something which it is presumed not to intend." (Endlich on the Interpretation of Stat., p. 151.)

In order to arrive at a true construction it is permissible, and, indeed, sometimes requisite, for the court to "take judicial notice of contemporaneous history or other authentic works and writings." (Endlich on Int. of Stat., p. 38.)

"Where there are earlier acts relating to the same subject the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law." (*Ibid.*, p. 54.)

If the territory in controversy was a part of the public domain by virtue of the treaty of 1819, followed by subsequent ratifications and the plain intent and effect of the act of the Texas legislature in 1850, then Congress could only dispose of it as such under the provisions of those statutes which provide for the disposition thereof. But whether it was such is really the question in controversy; and the position taken by the defence in this cause is that the Congressional act of 1879, by implication, was a relinquishment of this long-contested claim. The same rule of construction as would apply to a legislative grant must, we think, apply to a legislative surrender of the sovereign claim to title and jurisdiction, and this rule is exactly the reverse when applied to a legislative grant to that which would operate as between private contracting parties.

"The words of a private grant are taken most strongly against the grantor, but this rule is reversed in cases of public grants. They are construed strictly in favor of the Government on grounds of public policy." (Sutherland on Stat. Cons., section 478; Slidell *v.* Grandjean, 411 U. S. 413.)

If we admit that the act of 1879 is fairly susceptible of the construction that its intent was to abandon all further claim on the part of the United States to Greer county, and yet it is equally so that no such purpose was in the minds either of the legislators or those interested in, and representing, the State of Texas, still "the interpretation must be adopted which is most favorable to the Government." This doctrine was laid down by this court in an opinion by Mr. Justice Harlan, in 144 U. S., in which the court says:

"The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the Government or the public has an interest. (Rice *v.* Railroad Co., 1 Black, 358, 380; Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 666; Hannibal, &c., Railroad *v.* Missouri River Packet Co., 125 U. S. 260, 271; Central Transportation Co. *v.* Pullman's Car Co., 139 U. S. 24, 49; Stein *v.* Bienville Water Supply Co., 141 U. S. 67, 80; State *v.* Pacific Guano Co., 22 So. Car. 50, 83, 86.) Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. (Holyoke Co. *v.* Lyman, 15 Wall. 500; The Binghamton Bridge, 3 Wall. 51, 75.) This principle, it has been said, 'is a wise one, as it serves to defeat any purpose concealed by the skilful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' (Slidell *v.* Grandjean, 111 U. S. 412, 438.)" (Coosaw Mining Co. *v.* South Carolina, 144 U. S. 562.)

And in the same case the court says, speaking of the statute then under consideration, which was identical to the one here seeking interpretation, so far as the point covered is concerned:

"Neither the title nor the preamble indicates a purpose to enlarge the right given by the act of 1870 for twenty-one years to one for an indefinite period. While express provisions in the body of an act cannot be controlled or restrained by the title or preamble, the latter may be referred to when ascertaining the meaning of a statute which is susceptible of different constructions. In United States *v.* Fisher (2 Cranch, 358, 386), Chief Justice Marshall said: 'Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of

the legislature it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.' (United States *v.* Palmer, 3 Wheat. 610, 631.)"

In Winona, &c. *v.* Barney (113 U. S. 618, 625), speaking of legislative grants, this court has said: "They are to receive such a construction as will carry out the *intent* of Congress. * * * To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

See also Leavenworth R.R. Co. *v.* United States, 92 U. S. 733.

And in the recently decided cause of Barden *v.* Nor. Pac. R.R. the court reiterates this doctrine of construction, and says: "That it should be forever closed against further question." (154 U. S. 325.)

All these several rules of construction which we have cited, have their birth and existence in the repugnance with which courts look upon the suggestion that the delegates of a sovereign state or nation would be guilty of such a violation of the trust reposed in them as to fritter away, without consideration, and contrary to reason and good conscience, those things over which they had control for the public good. Hence the maxim, "the object and end of all government is to promote the happiness and prosperity of the people by which it is established; and it cannot be assumed that the Government intended to diminish its power of accomplishing the end for which it was created." (Sutherland on Stat. Cons., section 378, and cases cited.)

ESTOPPEL BY REASON OF OTHER ACTS.

There are several other grounds alleged and set forth as forming and constituting sufficient to bar the Government in this proceeding. They consist of the action of the Post-Office Department in regard to the establishing of post-office and post-roads; and the alleged acquiescence of the United States Government in the exercise of jurisdiction over the territory by the State of Texas, chiefly at a date subsequent to the issue of the Presidential proclamation in 1884.

It is a sufficient answer to this plea, we think, that estoppel cannot be pleaded by reason of an act of the party against whom pleaded, unless the one pleading it has been induced to act upon it. This doctrine has found approval in the court of last resort of the State of Texas; and the record of facts in this case seems to show so conclusively against the plea, that we might rely upon the edict of the courts of Texas herself for the position here taken.

In Griggsby *v.* Caruth (57 Texas, 269) it was held that a party who had sold in two parcels, to two purchasers, his community interest in certain real estate, no reference being made in the deeds to a contingent interest in the community interest of his mother in other portions of the realty from which the land sold had been partitioned, was not estopped when the question subsequently arose as to his inheritance on the death of his mother. The plea of estoppel was set up against him on his deeds, but it was held that as there were no recitals as to his mother's interest, and the true state of the title being equally known to both parties, he was not barred.

Whatever doubt there may be as to whether either of the parties to this suit had any other idea in view when any of the acts relied upon as a bar were done and performed,

save a recognition of the necessity for some form of government, and the willingness on the part of the United States not to precipitate a conflict, but await a lawful adjustment, still the one fact stands out prominently throughout this entire record, namely, that the State of Texas did not act upon these matters now pleaded in estoppel as operating a settlement of the disputed title, but in every way possible recognized the propriety and necessity of a determination of the subject by either the political or judicial powers of the Government.

The position of the State of Texas lacks the essential ingredient of not having been led to act differently in consequence of the matter set up in estoppel to what she would otherwise have acted. This is a fundamental principle and prerequisite to the operation of the bar. (Bigelow on Estoppel, 5th ed., p. 638.)

So far from having been led by the act of Congress referred to into doing anything which showed a reliance upon it as the basis of her actions, she only carried out the policy inaugurated upon the disagreement of the boundary commission of 1859, which was immediateiy followed by naming the territory "Greer."

In 1882 she provided for a new commission to settle the question of disputed boundary. There was no need of such a commission if the act of 1879 was a surrender of claim by the United States; and it is unreasonable to contend that she would have enacted that law, appointed the commissioners, and permitted the action taken by them if she construed the action of the United States as is now claimed in this plea.

But we observe, further, that as soon as it was suggested that Greer county should be recognized as part of the northern boundary of Texas by the bill introduced into Congress by Mr. Wellborn in 1885, that idea was repudiated

by Congress; and the President of the United States, the Secretary of War, and Secretary of the Interior had already, in 1884, no conception of such a condition of affairs, when in conjunction they asserted the emphatic claim disclosed by the record in this case.

In 1885, not only was the rule met which required the complainant to deny, when the State of Texas seemed to be asserting a claim through one of her Representatives in Congress, but, as we have shown, prior to that time the proper powers protested against any invasion of territorial rights in the disputed country.

In a case in which two sovereign states are contesting a question of boundary, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength. (R. I. *v.* Mass., 14 Pet. 210.)

The rule which operates ordinarily as a bar in equity does not apply in a case like this. It is analogous in the respect relied upon with an early case decided by this court. In R. I. *v.* Mass. (15 Pet. 273) the court has said:

"But it would be impossible, with any semblance of justice, to adopt such a rule of limitation in the case before us. For here two political communities are concerned, who cannot act with the same promptness as individuals; the boundary in question *was in a wild and unsettled country*, and the error not likely to be discovered until the lands were granted by the respective colonies, and the settlements approached the disputed line."

We might admit that the State of Texas, whose rightful territory skirted what is known as Greer county for a distance of about 100 miles, fitted out expeditions of war and peace, each of which crossed over the land in dispute half a century ago; but this mere fact would have no bearing upon the pleadings in this cause, when it appears so con-

clusively that the fact is indisputable, that the region was unexplored, and the very men who formed the expeditions have borne testimony to their own ignorance in this emphatic language:

"All that was known in our case was that Austin was in such a latitude and longitude, and Santa Fé in another; of the principal part of the country between the two points not a man of us knew anything. That deep rivers were to be crossed; that ravines were to be encountered; that salt and dry prairies were to be met—in short, that innumerable obstacles were to be met in our path—were things that every one expected; of the nature and extent of these obstacles all alike were ignorant."

And this was nearly a quarter of a century after the treaty of 1819 was made.

Under these circumstances we contend that the complainant has fully met the issue by proving that her long-continued ignorance "was occasioned by the wild and unsettled state of the country, and that the subsequent delay (if there was any) was produced by circumstances sufficiently cogent to justify it" was assented to by the other party, or occasioned by her conduct. (R. I. *v.* Mass., 15 Pet. 273.)

Under the ruling in the case just cited the defendant can only prevail against this state of facts when he shall have shown "that the (United States) *could not* have been ignorant of the true position of this line, * * * or if she remained in ignorance * * * that it must have arisen from such negligence and inattention to her rights as would render it inexcusable; * * * or she might show that after the mistake is admitted to have been discovered (she) was guilty of *laches* in not prosecuting her rights in the proper forum." (*Id.*)

This the defendant has utterly failed to do, but on the

contrary the persistent assertion of the Government claim studs the record from the earliest discovery of the true condition of the country, and was known as a matter of history by the witness ex-Gov. Ross ever since he was able to read the history of his State.

Mistake or Lack of Authority.

Courts look with disfavor upon applying the doctrine of estoppel against the sovereign.

This rule was laid down in The State *ex rel.* Lott *v.* Brewer (64th Ala. 287), where it is held that while the State may be estopped by its *express* grant, no bar can arise from the *laches* of its officers, because persons dealing with them are bound to know the extent of an officer's power and authority.

And in this case the court held that whether the error of the State's officer was one of law or fact, which led to the act done, did not conclude the State, and the court would not hesitate to reopen and review the account. The laboring oar was upon the party alleging the mistake, and in the case before the court we have taken it and clearly shown the early discovery of the error, its immediate correction, and a subsequent uniform practice. (See ev. of Stone and Bristow, 212–214, Record.)

In Pulaski County *v.* The State (42 Ark. 118) the officer of the State had actually paid to the county a rent claim for the use of the property which in the suit was alleged to be the property of the State and not of the county. This act was pleaded as an estoppel, but the court held that the State was not barred by this unauthorized act of its officer.

It is furthermore a rule in applying the doctrine of estoppel, when based on a former judgment, that the party alleging it must establish that the same fact sought to be litigated in the second suit was *in issue* in the first suit. (Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 475.)

It is true the pleading here is not based on a former suit, but the rule laid down is, we insist, strongly persuasive of the position contended for, viz: that the result claimed as accruing from the act must have been an issue in the minds and intent of the parties at the time.

And in The Attorney-General *v.* Chas. S. Marr *et al.* (55 Mich. 445) it was held that where a board of supervisors, without the legal power so to do, had designated the bounds of a township, long acquiescence did not estop the State from asserting her rights and correcting the wrong.

It is therefore submitted that since the action pleaded was not mutually understood to be a surrender of the Government's claim; since the party pleading was not induced to action thereby; since no damage or detriment can result to the State of Texas on account of things induced by the acts of the other party; and in view of the notice given even before such a claim was made, nothing alleged in this regard can operate to bar the relief now sought.

To these views might be added the absolute absence of any consideration whatever for the surrender of a territory larger than the State of Delaware. Certainly that fact, taken in connection with the absence of any words of grant or relinquishment, must aid in ascertaining the understanding of the parties and the consequent legal status of this claim.

It is, upon the facts and law presented, respectfully contended that the United States and not the State of Texas has a clear and just title to the territory in dispute in this cause.

Respectfully submitted.

EDGAR ALLAN,

Special Ass't to the Attorney-General,

Counsel for Complainant.

INDEX.

	PAGE.
Statement of the Case	1–3
Origin of the Controversy	3–7
The Melish Meridian	7–11
Survey of the 100th Meridian	11–15
The Forks of Red River	15–18
Knowledge of the Treaty-Makers	18–22
The Error of Melish's Map	22–26
The Melish Map of 1818	26
The Rio Rojo is the Canadian	26–29
The Melish Map of 1823	29–31
Expedition of Col. Dodge in 1834	32
Catlin, Gregg, Kendall, Marcy, and Kennedy	33
Govs. Roberts and Ireland on Unknown Land	34–35
Can the Treaty Map be relied upon for Aid	37–51
Mr. Corner's Exhibit B, with explanation	48–49
The Real Red River	52–58
The Spanish Empressario Contracts	59–64
The Pressler Map of 1858	65–69
The South Fork the Main Stream	70–83
Defendant's Evidence on Characteristics of Stream	84–100
Expert Testimony—Corner *v.* Abbot	101–108
Relative Color of the Streams	109–110
Ancient Names of Streams	111–132
Names as shown by Bureau of Ethnology	129
The Alleged Santa Fé Trail	133
Other Old Trails	157
Old Settlements	161
Stations de Muletiers	161
Radziminski and other Camps	171
Facts touching Exercise of Jurisdiction	179
President Arthur's Proclamation in 1884	193
Post-Office Department called it Greer Co., Texas	198
The Federal Court's Jurisdiction	200
The issue of Land Certificates	202
The Correctness of the 100th Meridian	205
The Law of the Case	211
Conditions Seen and Unseen	212
The Jones and Brown Meridian	213
Effect of Judiciary Act of 1879	215
Estoppel by reason of other acts	227

MAP EXHIBITS

PRINTED IN RECORD.

	Record Page.
Conclin's Map of Cameron Grant (1840)	170
Catlin's Map of Indian Locations (1833)	170
Map of Merrill's Route, Santa Fé and other Trails (1855)	172
Smith's Map of Texas, showing Boundary in (1849)	184
Lee's Map, showing Cameron Grant in (1836)	185
Sketch of Post-Office Locations (H. C. Sweet)	222
Robt. Creuzbaur's superposition (No. 1)	292
Extract from Cram's Atlas (No. 2)	292
Extract from DeCordova Map of '48 (No. 3)	292
Extract from Pressler Map of 1867 (No. 4)	292
Extract from Pressler Map of 1867, showing Greer as Indian Territory (No. 5.)	292
Extract from Creuzbaur's Map of 1848 (No. 6)	292
Certified Extract of State Map in use to 1858 (No. 7)	292
Certified Extract of Austin's Map of 1837 (No. 8) (See also Exhibit B, after page 984.)	292
Certified Extract of Old Colony Map in 1858 (No. 9)	292
Mitchell-Young Map, showing Cameron Grant and Indian Villages (1836)	294
Sketch of Country, filed by S. E. Stillwell	560
Chaddle-Kaungky's Sketch	650
Map with Report of State Geologist (Ex. D)	984
Hunt and Randall Map of Land Districts (1839)	984
Chas. Corner's Superposition (Ex. B)	1392
Copy of part of Melish Map of the Treaty (Ex. G)	1392
Map of Oklahoma Territory (1891)	1392
Extract from Humboldt's Map (Ex. I)	1392

MAPS FILED BUT NOT PRINTED.

1. Extract from Darby's Map.
2. Extract from the Melish Map of 1823.
3. Carey Map of 1822.
4. Extract from Pike's Chart.
5. Extract from Pike's Chart.
6. Extract from Melish Map of 1818.
7. Extract from De Cordova Map of 1849.
8. Extract from Desturnell's Map of 1847.
9. Extract from Humboldt's Map.
10. Capt. R. B. Marcy's Map.
11. Major Long's Map.
12. Map by Anthony Nau.

NOTE.—The above are photographic copies taken from maps filed before the Texas Boundary Commission of 1886, and referred to on page 254, Record.

Also maps numbered 1 to 28, being the orignal maps used by the Boundary Commission of 1886, and referred to in deposition of J. C. Clements, pp. 239-240, Record.

Office Supreme Court, U. S.
FILED.
FEB 2 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1894.

No. 4, Original.

THE UNITED STATES

vs.

THE STATE OF TEXAS.

BRIEF OF

CHARLES A. CULBERSON,
GEORGE CLARK,
A. H. GARLAND,
H. J. MAY,
Solicitors for Defendant.

Supreme Court of the United States.

October Term, 1894.

No. 4. Original.

THE UNITED STATES,—COMPLAINANT,

VS.

THE STATE OF TEXAS,—DEFENDANT.

IN EQUITY.

BRIEF FOR DEFENDANT.

The object and purposes of this suit are fully before the Court, in 143 United States, 621 et seq. It is a contest to judicially determine the boundary between the United States and Texas, in which the right to Greer Co., Texas, containing over a million and a half acres of land, is involved. Complainant claims positively that it is entitled to it, and the defendant as stoutly denies complainant's right, and asserts her own; and Texas denies any jurisdiction of this Court to hear or determine any such controversy. Much testimony has been taken on the issue so squarely made and presented, and no little of that

testimony is excepted to on both sides as being incompetent, which is before the Court with the entire case, according to the usual rule of practice in chancery.

It may not be improper to premise, at the outset, that complainant occupies a peculiar attitude in this suit, under the usual rules of equity. The United States stands upon the record in the attitude of a double warrantor to Texas.

1. By the terms of the treaty of 1819, between the United States and the King of Spain, the United States ceded (granted and conveyed) to Spain certain territory to which she claimed she had perfect title, in exchange for the territory of the East and West Floridas. President Monroe, in his third annual message, used these words:

"For territory ceded by Spain (Florida) other territory of great value, to which our claim was believed to be well founded, was ceded by the United States, and in a quarter more interesting to her." (Statesm. Man., vol 1, p. 412.)

It is plain, therefore, that as to the Floridas, Spain was the grantor and the United States the grantee; and as to Texas, the United States occupied the attitude of grantor and Spain that of grantee. This has been practically decided by this Court in a case arising upon the treaty of 1819, in U. S. vs. Arredondo (6 Pet. 741). This Court held that as to Florida, the King of Spain was grantor and that the treaty was his deed. Certainly the same rule will apply to the United States with reference to the territory of Texas ceded in the same treaty to Spain and in the same language.

As Texas stands in direct privity with Spain, the United States is the grantor in the deed and Texas is the grantee, for Texas occupies identically the attitude of Spain so far as the territory rights under the treaty are concerned. The invariable rule is that a deed is to be construed most strongly against the grantor, and all doubts are resolved in favor of the grantee on the principle that the grantor has it in his power to define by exact language the limits of the thing granted, and if he fails to employ proper language for this purpose it is his own fault and he must suffer rather than the other party. All writers on international law agree that this rule of law applies as well in the interpretation of treaties between nations as in private writings between individuals. (See authorities hereafter cited.)

Texas then occupies the attitude of the grantee to the United States under the terms of a solemn treaty, which contains the following provision:

"The two high contracting parties agreeing to cede and renounce all their rights, claims and pretensions to the territory described by the said line. That is to say, the United States hereby cede to His Catholic Majesty and renounce forever all their rights, claims and pretensions to the territories lying west and south of the above described line, and in like manner His Catholic Majesty cedes to the United States all his rights, claims and pretensions to any territories east and north of the said line, and for himself, his heirs and successors, renounces all claim to the said territory forever."

2. Again, by the terms of a joint resolution of the Congress of the United States, approved March 1,

1845, and under which Texas was admitted into the Union of the States, it was expressly stipulated:

"That the territory properly included within and rightly belonging to the Republic of Texas might be erected into a new State"; and that said State should "retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities should be disposed of as said State may direct." It was further stipulated in said joint resolution that said State of Texas was to be admitted into the Union "subject to the adjustment by this (U. S.) government of all questions of boundary that may arise with other governments." These stipulations, which were accepted by Texas, and became in the nature of a compact between the two independent Republics then existing, together with the terms of the original treaty of 1819, places the United States in the attitude of guaranteeing the inviolability of Texas' domain and is in fact and in effect a double warranty on the part of the United States that she would protect the State of Texas in the full ownership and enjoyment of her entire limits as then established and existing by force of former treaties with the Kingdom of Spain and with the Republic of Mexico, to each of whom Texas stands in direct privity of ownership. The Court will also bear in mind that Texas is not here before this Court as a defendant by her own consent. She has been brought here under judicial process, over her protest and demurrer, by virtue of an act of the Con-

gress of the United States, to which as a State she has never assented. And yet in obedience to the decree of this Court she is here to contest, according to the established rules and principles of law and equity, the assertion of the United States to that portion of her territory now in issue in this suit, and is prepared to establish by the record made, that the claim of the government of the United States to said territory is unfounded in law and contrary to morals; and that said territory is and has always been her rightful and lawful domain. The interest of complainant in the controversy is not apparent. The defendant, the State of Texas, being a part of the United States, and one of the sovereign States of the Union, the constitutional jurisdiction of the Federal government obtains with equal force whether its claim prevails in this suit or otherwise. The contest is practically, whether Texas shall continue to enjoy her own lawful and ancient possessions, or whether a portion thereof shall be seized by the National government, and turned over to and be incorporated with, a different territory to become subsequently and in the near future another State of the Union. The United States ought, therefore, to be indifferent to the result, because it is apparent that she has no interest, pecuniary or governmental, in such result. Whether Greer county shall remain a part of Texas or become a part of Oklahoma Territory cannot be a subject of concern to the United States. And in either event the United States loses or gains nothing by the result. Confidently invoking, therefore, the most careful consideration of the

record in this cause by the Court, we proceed to a discussion of the issues raised thereon.

PROPOSITION I.

The treaty of 1819 between Spain and the United States having prescribed in plain and unambiguous terms that the boundary lines between the two nations as therein indicated, should be as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818, which map was appended to the treaty and became a part thereof, it is fruitless now to inquire further as to the location of the true 100th meridian of longitude, or which branch of Red river is the mainriver. The map of Melish fixes the 100th degree of longitude west from Greenwich approximately, seventy miles below and east of the forks of Red river as now known, and is conclusive upon both parties to the treaty, their privies and successors, regardless of other facts.

The matters of fact asserted in the above proposition are conceded. There is no controversy between complainant and defendant as to the position of the 100th meridian of longitude west from Greenwich as laid down upon Melish's map. The map of Melish is in the record (p. 38), and speaks conclusively for itself; and the original of said map is an archive in the State department, attached to the treaty of 1819 and accessible to this court. We do not understand counsel for the government as controverting the fact as stated. The terms of the treaty as to boundaries are as follows:

"Article 3. The boundary line between the two

countries west of the Mississippi shall begin on the Gulf of Mexico at the mouth of the river Sabine, in the sea; continuing north along the west bank of that river to the 32nd degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or Red river; then following the course of the Rio Roxo westward to the degree of longitude 100 degrees west from London and 23 degrees from Washington; then crossing the said Red river and running thence by a line due north to the river Arkansas to its source in latitude 42 degrees north; and thence by that parallel of latitude to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But if the source of the Arkansas river shall be found to fall north or south of latitude 42 degrees, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude of 42 degrees, and thence along the said parallel to the South Sea. * * * The two high contracting parties agree to cede and renounce all their rights, claims and pretensions to the territories described by the said line; that is to say: the United States hereby cede to His Catholic Majesty, and renounce forever all the rights, claims and pretensions to the territories lying west and south of the above described line. And in like manner His Catholic Majesty cedes to the said United States all his rights, claims and pretensions to any territories east and north of said line, and for himself, his heirs and successors, renounces all claim to the said territories forever."

"Article 4. To fix this line with more precision and to place the landmarks which shall designate exactly the limits of both nations, each of the contracting parties shall appoint a commissioner and surveyor who shall meet before the termination of

one year from the date of the ratification of the treaty at Nachitoches on Red river, and proceed to run and mark the said line from the mouth of the Sabine to the Red river and from the Red river to the river Arkansas, and to ascertain the source of the said river Arkansas, in conformity to what is above agreed upon and stipulated, and the line of latitude 42 degrees to the South Sea; they shall make out plans and keep journals of their proceedings, and the results agreed upon by them shall be considered as part of this treaty, and shall have the same force as if it were inserted therein."

It will be observed that the respective parties to the treaty in addition to stipulating that the 100th degree of longitude west from Greenwich should be as laid down in Melish's map of the United States of 1818, expressly stipulated that the true parallel of latitude 42 degrees should be exactly ascertained. In other words, the parties plainly agreed that the 100th meridian of longitude as laid down in Melish's map should govern, whether it was the correct meridian of longitude or otherwise. But as to the parallel of latitude they took care to stipulate that it should be accurately ascertained, and in case it was found by an actual survey and determination of said parallel that the Arkansas river fell north or south of said latitude 42, then the line should run from the source of the Arkansas river, either due south or due north as the case might be, till it met the said parallel of latitude. It will be further observed from the treaty, and is apparent, that it was not the intention of the high contracting powers that any line should be run by actual measurement except the line from the mouth of the Sabine

to the Red river, and from the Red river to the river Arkansas. And there was no provision made for running the line of Red river at all, or of determining at what point the true 100th meridian of longitude west from Greenwich should intersect Red river. This, it will be also observed, was at the express instance of Mr. Adams, our secretary of state, made in the progress of the negotiations (See letter of J. Q. Adams to Louis de Onis, October 31st, 1818, Supp. Rec. p. 23). These deductions, from the language of the treaty, are not without significance, especially when taken in connection with the general features of the correspondence between the two high contracting powers leading up to its execution. This correspondence which constitutes a part of the record in this cause (See Supplemental Record, pp. 18 et seq), manifests with additional force and clearness, if such are needed, the meaning and intention of the parties to the treaty and the true interpretation of its plain and simple language. The court will perceive from this correspondence that the respective parties to the treaty were wide apart in their respective views at its inception, the United States claiming not only East and West Florida, but that its boundary line of right should extend to the Rio Bravo, now the Rio Grande; while Spain on the other hand insisted that the true boundary line between the two countries should begin on the Gulf of Mexico, between the rivers Mermento and Calcasia, crossing the Rio Roxo at the 32nd degree of latitude and the 93rd meridian of longitude west from London. On October 31st, 1818, John Quincy Adams, as

secretary of state, proposed to Louis de Onis, the Spanish minister, as a final offer on the part of the United States, that the boundary line should begin "at the mouth of the river Sabine, on the Gulf of Mexico, following the course of said river to the 32nd degree of latitude; * * * thence due north to the northermost part of the 33rd degree of north latitude and until it strikes the Rio Roxo, or Red river; thence following the course of the said river to its source, touching the chain of the Snow mountains in latitude 37 degrees 25 minutes north, longitude 106 degrees 15 minutes west, or thereabouts, *as marked on Melish's map;* thence to the summit of the said mountains and following the chain of same to the 41st parallel of latitude; thence following the said parallel of latitude 41 degrees to the South Sea."

To this proposition the Spanish minister replied on the 16th of November, 1818, agreeing to admit the river Sabine instead of the Mermento, as the boundary between the two powers from the Gulf of Mexico, on condition that the United States would agree that the line should run due north from where it crosses the Rio Roxo until it strikes the Mississippi, and should extend thence along the middle of the latter river to its source, leaving to Spain the territory lying to the right and to the United States the territory lying to the left of same. Adding in significant language, that the demands of the American secretary of state respecting the extension of the same line beyond the Missouri, along the Spanish possessions to the Pacific Ocean, exceeded "by its magnitude and its transcendancy all former demands and pretensions started by the United States."

This proposition was promptly rejected by Mr. Adams on November 30th, 1818, and after further correspondence, all of which is of record, the following proposition was submitted by Mr. Adams, the secretary of state, on February 6th, 1819:

"It is agreed that the western boundary between the United States and the territories of Spain shall be as follows: Beginning at the mouth of the river Sabine on the Gulf of Mexico; following the course of said river to the thirty-second degree of latitude, the eastern bank and all the islands of the river to belong to the United States, and the western bank to Spain; thence due north to the northermost part of the thirty-third degree of north latitude and until it strikes the Rio Roxo or Red river; thence following the course of said river to the northermost point of the bend between longitude 101 and 102; thence following the course of the river Arkansas to its source in latitude 41 north; thence following the same parallel of latitude 41 to the South Sea." *

* * *The whole being as laid down in Melish's map of the United States, published at Philadelphia and improved to the first of January, 1818.* But if the source of the Arkansas river should fall south or north of latitude 41 degrees, then the line from the said source shall run due north or south as the case may be till it meets the said parallel of latitude, and thence as aforesaid to the South Sea."

To this proposition the Spanish minister, De Onis, replied on February 9, 1819, submitting a counter-proposition, suggesting that the boundary line should begin as stated by Mr. Adams at the mouth of the Sabine river in the sea, and should continue along the middle of the river to the 32nd degree of latitude; thence by a line due north to the

33rd degree of latitude where it strikes the Rio Roxo of Natchitoches (Red river) following the course of the Rio Roxo to the 100th degree of longitude and 33¼ degrees latitude where it crosses the river; thence by a line due north by the said 100th degree of longitude from London, according to Melish's map, till it enters the river Arkansas, etc.

To this projet of the treaty a counter-projet was submitted by Mr. Adams to Don Louś de Onis on the 13th of February, 1819, agreeing substantially with the projet submitted by De Onis except that the line should follow the course of the Rio Roxo westward to the 102d degree of longitude west from London; thence crossing Red river and running thence by a line due north to the Arkansas river; and thence following the course of the southern bank of the Arkansas to its source and in latitude 41 degrees north. The whole being as laid down in Melish's map, published in the City of Philadelphia and improved to March, 1818, and containing the same stipulation as found in the treaty as to the source of the Arkansas river in case it was found to fall north or south of latitude 41 degrees.

To this projet the minister of Spain replied as follows:

"The minister of Spain agrees to the 100th degree of longitude, and to remove all difficulties, to admit the 42d degree instead of the 43d degree of latitude from the Arkansas to the Pacific Ocean."

To which Mr. Adams, the secretary of state, replied, "Agreed," and thereupon the treaty was duly executed in the language above quoted. (Supp. Rec., pp. 27-30.)

This correspondence is important in furnishing some light as to the intentions of the respective parties to the treaty, and is therefore submitted for that purpose. It is manifest therefrom:

1. That while the United States was endeavoring to press its western boundary as far west as possible, Spain was equally determined that said boundary should not approach any of her settled possessions.

2. Also manifest that the proposition to settle the boundary according to Melish's map came from the United States and was accepted by Spain.

3. That Melish's map was before the respective parties throughout the whole negotiation and at least for many months before the consummation of the treaty.

4. That the respective parties to the treaty intended to be governed by said map and not by lines run or to be run, but by degrees of longitude as laid down by Melish in his map.

5. To manifest this the more clearly a provision was embodied in the treaty as to the 42d parallel of latitude distinctly specifying that such latitude and its juxtaposition with reference to the Arkansas river should be accurately ascertained by the parties, while there is no such provision as to the 100th degree of longitude.

Geographical theories are therefore in no manner involved in this case. The only questions for the Court to answer are:

1. What was the line of the treaty of 1819?
2. Where does the 100th degree of longitude

west from London and the 23rd from Washington cross the Rio Roxo of Natchitoches (Red river) as laid down in Melish's map of the United States, published in Philadelphia, and improved to the first of January, 1818? The language of the United States patent deeds after designating the land and range and acreage is as follows: "According to the official plat of the survey of said lands returned to the United States land office by the surveyor general."

The language of the treaty of 1819, after designating the course of the boundary line with reference to the Gulf of Mexico, sea and river, degree of latitude and longitude, is as follows:

"The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818."

It is immaterial in either of the above references to the official plat of the surveyor general, or to Melish's map, that the survey or map are accurate. It is immaterial to inquire into the knowledge or qualification of the surveyor general in the one case, or the map-maker in the other; although a very pertinent subject of inquiry at the time or prior to the execution of the deed or treaty. The boundary established and fixed by compact between nations becomes conclusive upon all subjects and citizens thereof and binds their rights and is to be treated to all intents and purposes as the true real boundary between States.

The State of R. I. vs. The Commonwealth, 12th Peters, 657.

"The purpose of construction is to expound

treaties, not to frame them." Wildman Int. L., Sec. 177.

The "survey" and the "map" by reason of the reference, becomes as much a part of the deed in the one case and the treaty in the other as if the "survey" or "map" was traced upon and incorporated by tracing in the deed or treaty. Surveys, plats or maps to which reference is made in the deed, contract, act of congress, or a treaty, have the same effect and operate as if they were inserted at length in the clause referring to them. This rule is too well settled to require a reference to authorities, but the following are cited:

Fitzmaurice vs. Bailey, 9 H. L. Cases, p. 99.

Elliott vs. Northeastern R'y, 10 H. L. Cases, p. 333.

In McIver, lessee, vs. Walker et al. (9 Cranch's Rep., 173), this Court was first called upon to construe the effect of a plat accompanying a patent. In that case if the lands sued for were run according to the course of the needle and the distances called for, the land would not include a certain creek. If run according to the true meridian, the land would include the creek. By the plat which was prepared at Raleigh, N. C., the land being in Tennessee, then a part of the first named State, the land included the creek. None of the calls in the patent crossed said creek and there had never been any lines actually run. The lower court held that the grant must be run according to the course of the needle and distances. This ruling was reversed by this Court, and it was held that the grant must be run to conform

as near as might be to the plat annexed to the grant. And Chief Justice Marshall, who delivered the opinion, added this language, "That he did not think the question about the true meridian had much to do with the case. The Court decided it upon the plat,"

The same case (McIver vs. Walker) was again before this Court (4th Wheaton, 444) on practically the same facts, and the Court unanimously adhered to the former decision after two arguments.

In Noonan vs. Lee (2nd Black, 499), involving a plat totally void under the law and which designated the fractional lot in controversy as the southeast part of the southeast quarter of section No. 4, when the lot was laid out on fractional lot No. 2 of said section, this Court held that although the plat was fatally defective, yet it controlled, and Justice Swain in delivering the opinion, used this language: "As regards the statute the plat was fatally defective and afforded no warrant to the recording officer for putting it on record. Nevertheless it being there was a fact, and whether there or elsewhere the reference to it in the deed for the purpose of fixing the boundary is sufficient. * * * Where a map or plat is thus referred to the effect is the same as if it were copied into the deed." This is the standard rule in most, if not all the States. See 2nd Delvin on Deeds, §1020, and numerous authorities cited. The Supreme Court of California in Mayo vs. Mazeaux (38 Cal. 422), held that, "In construing a deed of conveyance in which the land intended to be conveyed is described by reference to certain degrees of latitude, and also to a certain map therein specifically de-

scribed, the degrees of latitude and other imaginary lines will be discarded as less certain and reliable than the map."

This principle is included in that maxim of general application that words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them.

Broom, L. M. 673, et seq.
Comm. vs. Penn Land, 66 Pa., 42-56.
Comm. vs. Hart, 11 Cush., 137.
Comm. vs. Jennings, 121 Mass., 50.
2 Wharton Int. Law Dig., 161a (2d Ed.)
Doe vs. Brayden, 16 Howard, 635-656.
Randon vs. Toby, 11 Howard, 518-19.

And as to touching the consideration of maps thus referred to the rule is as unbending as it is universal.

Tyler on boundaries 138, 144, 169, 196 et seq., 286, 310-314.
3 Wash. Real property, 412, Note 4.
People vs. Dana, 22 Cal., 11.

In Glover vs. Shields, 32 Barb., 374–381, while the court adopted this rule it is said in addition it must be received and considered as fixed at the date of the deed referring to the maps, and nothing occurring after that could change the line, and the parties should not question it.

Jurisprudence familiar and of use in Spain, Mexico, and to a large extent in Texas, recognizes this rule so well established in England and this country.

1. Domat, Sec. 2030.

as near as might be to the plat annexed to the grant. And Chief Justice Marshall, who delivered the opinion, added this language, "That he did not think the question about the true meridian had much to do with the case. The Court decided it upon the plat,"

The same case (McIver vs. Walker) was again before this Court (4th Wheaton, 444) on practically the same facts, and the Court unanimously adhered to the former decision after two arguments.

In Noonan vs. Lee (2nd Black, 499), involving a plat totally void under the law and which designated the fractional lot in controversy as the southeast part of the southeast quarter of section No. 4, when the lot was laid out on fractional lot No. 2 of said section, this Court held that although the plat was fatally defective, yet it controlled, and Justice Swain in delivering the opinion, used this language: "As regards the statute the plat was fatally defective and afforded no warrant to the recording officer for putting it on record. Nevertheless it being there was a fact, and whether there or elsewhere the reference to it in the deed for the purpose of fixing the boundary is sufficient. * * * Where a map or plat is thus referred to the effect is the same as if it were copied into the deed." This is the standard rule in most, if not all the States. See 2nd Delvin on Deeds, §1020, and numerous authorities cited. The Supreme Court of California in Mayo vs. Mazeaux (38 Cal. 422), held that, "In construing a deed of conveyance in which the land intended to be conveyed is described by reference to certain degrees of latitude, and also to a certain map therein specifically de-

scribed, the degrees of latitude and other imaginary lines will be discarded as less certain and reliable than the map."

This principle is included in that maxim of general application that words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them.

Broom, L. M. 673, et seq.
Comm. vs. Penn Land, 66 Pa., 42-56.
Comm. vs. Hart, 11 Cush., 137.
Comm. vs. Jennings, 121 Mass., 50.
2 Wharton Int. Law Dig., 161a (2d Ed.)
Doe vs. Brayden, 16 Howard, 635-656.
Randon vs. Toby, 11 Howard, 518-19.

And as to touching the consideration of maps thus referred to the rule is as unbending as it is universal.

Tyler on boundaries 138, 144, 169, 196 et seq., 286, 310-314.
3 Wash. Real property, 412, Note 4.
People vs. Dana, 22 Cal., 11.

In Glover vs. Shields, 32 Barb., 374–381, while the court adopted this rule it is said in addition it must be received and considered as fixed at the date of the deed referring to the maps, and nothing occurring after that could change the line, and the parties should not question it.

Jurisprudence familiar and of use in Spain, Mexico, and to a large extent in Texas, recognizes this rule so well established in England and this country.

1. Domat, Sec. 2030.

Escriche's Dict. of L. and J. (Madrid Ed)., p. 927, et seq.

3. Colquhoun, Rom. C. Law, p. 478; Sec. 2179, pp. 10, 11, 18.

Then the acquiescence of the parties to this as distinguished from open acts of estoppel binds them and their privies forever to it, correct or incorrect, right or not.

32 Barb., supra.

Jordan vs. Deaton, 23 Ark., 704.

Wash., supra, 81–84, ib., 348–363.

Tyler on Boundaries, sup. 233–244, 333–337.

The fact that we are dealing with a treaty instead of a deed or contract creates no exception to this rule or interpretation. The rule is the same between nations as to treaties as between individuals as to private conveyances.

Wheat. Int. L., 355.

Wharton Am. L., Sec. 157, citing leading case of Foster vs. Neilson, 2 Pet., 253.

Bish. W. L., Sec. 11a.; 2 Wharton Int. Law Dig., Sec. 133 (2 ed).

"Its meaning (speaking of a treaty) is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts."

1 Kent. Com., 174, Note (D) (13 Ed. Holmes).

As said by Eyre, Ch. J., in Maryatt vs. Wilson, 1 Bos. & Pul., 436–439:

"A treaty is to be construed like any other instrument, public or private, and courts must collect from

the nature of the subject, from the words and the context, the true intent and meaning of the contracting parties, whether they are A and B or happen to be two independent States."

We are not making a treaty now, but we are engaged in finding out the meaning of one made in 1819, "by the only sovereign powers at the time interested in the subject" (Missouri vs. Kentucky, 11 Wall., 401, a case of great use here, in other respects to be hereafter noticed); and this treaty still stands unchanged, unaltered, and not merely that but in fact twice since ratified and approved by the only competent powers to act under it, to-wit, in 1828 by the United States and Mexico, in 1838 by the United States and Texas, and again by the United States in recognition of the Republic of Texas, and by the act admitting her as a State. X

The Court will hold steadily in view that the line was established as by *Melish's Map,* a map known and written about long before this treaty was made by our people and by the Spanish people, by Spanish officials and by United States officials, improved to January 1st, 1818, as we have it in our language; "perfectionado" (perfected) as the Spanish have it; and "corrigee" (corrected) as the French have it, but all meaning the same thing substantially. And the words in our language referring to the line, *the whole being as laid down, etc.*, are thus offset in the Spanish, "todo segun, etc." (all according to), and in the French "d'apres la carte" (after the map); but the three meaning that Melish's map was put into that treaty and controlled the matter, and by it the dividing line was to be known and established, no

X "The purpose of construction is to ex-pound treaties, not to frame them".

matter where future astronomers, hunters, Indian agents, or land speculators might find or suppose they had found the particular meridian to be, or the South fork or anything else to be. An arbitrary line had to be fixed and it was fixed according to Melish's map, as improved up to the date named. These words, whether taken in the English, Spanish or French, "according to Melish's map," are substantial and qualifying words and cannot be read out of the treaty any more than what precedes them can. And it is not to be presumed that the high contracting parties were ignorant and employed meaningless and therefore useless words. Every word must count, and if ever the rule of ex anticedentibus et consequentibus, etc. [Broom's Legal Maxims, 577; Sedgwick Const. L., 226; 2 Kent 555, Sec. 414), had force and effect it should have here; for we must not forget we construe a treaty just as private deeds, contracts etc. Therefore utterly irrelevant and immaterial are the references to other maps than the one which constituted the basis of the treaty and which was before the eye and in the mind of the contracting parties to the treaty; as is also the investigation or inquiry concerning the true 100th degree of longitude which appears to be almost a fugitive from justice by reason of its westward travel and unstable character. So far as this case is concerned the only line of longtitude involved is that numbered as the 100th degree on Melish's map. As said before that this imaginary line crosses the Rio Roxo east of the most easterly boundary of Greer county is undenied and undeniable, and the decree that must

follow as the natural logical consequence is that the title to Greer county became vested in the State of Texas upon the admission of the State to the Union, and that the United States never had and never acquired title thereto. But on the contrary by her solemn act she ceded to Spain and to her successors all her right, title and interest in all the lands lying West of said 100th meridian of longitude as laid down by Melish, which lands became the property of Texas by virtue of her successful revolution in 1836, and was her rightful domain when admitted into the Union of States by virtue of the joint resolution of 1845, upon a solemn guaranty on the part of the United States that her territory should remain inviolate to her and belong alone to her.

This Melish map may have been wrong as to the meridian, but it made fixed the line by marks that cannot be mistaken, and future scientific speculation and conjecture together with all the testimony of the human family cannot overthrow it or set it aside. And here as in the Kentucky and Missouri case (11 Wall. sup.), the work is done and finished by the powers who alone could do it, and no future changes of woods, channels, hills, valleys or meridians could undo it. This whole question is so fully and clearly set forth in Jennings vs. Trager, 40 Fed. Rep., 728, we will give the words of the Court: "The 31st parallel North latitude was agreed to be the line between the United States and Spain, and consequently between the States of Mississippi and Louisiana; and it was further agreed that the commissioners named should determine where that parallel was

and fix and mark its actual location. When that was done the line of demarkation as fixed must remain to this day, whether there is any mistake in determining, running and marking it or not; and no subsequent agreement or survey could change or alter it." This, too, arose under a treaty between the United States and Spain and leaves not a vestige of pretended claim here asserted by the United States.

In the proclamation of President Monroe, announcing the adoption of the treaty of 1819, he says (Pub. Domai. Sup., 115): "In pursuance of the advice and consent of the senate, I accept, ratify and confirm the said treaty and every clause and article thereof." The Melish map being a component part of that treaty—a clause of it—it was accepted, ratified and confirmed, too, and can no more be expunged or ignored than the article (3rd) of which it is a clause.

Directly in the same line we have been following in this argument is the reasoning of William, King of the Netherlands, &c., as arbitrator under the 5th article of the treaty of Ghent as to the map (A) recognized by the convention of 1827, and to this award of King William the special attention of the Court is invoked.

See 1 Elliott, American Diplomatic Code, pp. 320-329. The intention was to fix by the treaty of 1819 the boundary line, or to "designate with precision the limits of their respective bordering territories in North America." That is, to make firm, stable, or fast; to set or place permamently; to fasten immovably; to establish; to implant; to secure; to make definite for all time and not leave it to future occur-

rences or developments to put it here, there, or elsewhere. It was not left for the searching after and hunting of meridians, nor the coming and going of streams, prairie-dogs, hunters and trappers. To fix or "designate with precision" does not mean that, and here is a good illustration of it. General McClellan in 1852, and at that time a captain of engineers, finds the meridian at one place, to-wit, about six miles east of the junction of the two forks of Red river. (See Marcy's report of 1852, p. 19, sup., Rec., p. 3-18.) In 1857 Jones and Brown find it at quite another place, to-wit, about forty miles west of where it was fixed by McClellan. And still later (1892), Professor Pritchett, with all the accretions of science and with all the modern improvements, finds it yet differently. (Rec., p. 1194, et seq.) Can the division line be at all these places? Can it be transitory and not fixed? By no means. Then where is it? It is where Melish's map put it, definite and stable, and without it the division line is left as uncertain as the changes of the weather. At last, and simply and plainly, we are not finding or fixing latitude, longitude or meridians, we are not called upon to do that, but we are merely asked to find where—the place, the point—Melish's map found and fixed them as indicating the division line between Spain and the United States. Here this case might and should end, but let us see if this theory has not been recognized by all persons, States and nations having any interest in the matter—if history then and until now does not confirm and sanction this view.

First Yoakum's Hist. of Texas, 77 et seq., does, and so in his 2d Vol., 217-307-332. So does Pub. Domain by Thos. Donaldson, 1883-4 pt. 4, 120-1, under the title of the Republic of Texas organized, ib. 134-5 (Tit. Boundaries of Tex.) 2d Von Holt Constl. Hist. U. S., 548-9, referring to the facts and proceedings as to this boundary question, declares what we have seen in the treaty, and states this settlement to be as we have argued it: See also Cong., Globe, 1st., 29th, p. 808, 2d column appx., pp. 579-641-803-903-908, 16-28: 1098; 1101: 2d, 29th, 230, also in appx., index, &c.

1st 30th, 774, 836, 859-74-82; 989-91-2: 1006: appx., 659, 924, 928; 2d 30th, 560, 610-26-67-81: 1st: 31st, pt. 2, 1540-2-51-55.

This boundary is recognized by the constitutional congress of the State of Coahuila and Texas, in August, 1824.

1 White New Recop., 421 et seq: and also in the colonization project of Col. Stephen Austin, 1821-9: 1 White sup. 559 et seq.

These acts of recognition and acquiescence as to the line according to Melish's map could be multiplied indefinitely, but more is not needed. The record has them in addition, to an extent that would gratify the most anxious and doubting.

Only a few words more on this point.

An assumption is indulged in that this map was little known or studied by the men of that day, but this is without foundation utterly. It was constantly before them, examined and scrutinized most closely. Attention was given to it as the basis of the

treaty and as an integral part of it. See J. Q. Adams Mems., Vol. 4, 233–280.

At last the chief difficulty in coming to terms did not pertain to the line east, but it attached to the northern and western lines. An objection was long persisted in by Spain that instead of the banks of the rivers named being boundaries the middle of the rivers should be the dividing line (Adams, sup). This objection was at last abandoned, and finally, on the 19th of February, 1819, at about the last Cabinet meeting to consider the treaty, a suggestion was made by Mr. Crawford, to take as a boundary a certain chain of mountains "as mountains are better boundaries than rivers, but as there is no certainty that there is any chain of mountains south of, &c., with Red river great part of the contemplated line as a chain marked on Melish's map to which the treaty is referred extends only a small part of the way, no one knows how the range of mountains there really runs or what distance from the river." (Adams sup. 266.)

Thus we see a perfect ingrafting of this map into this treaty as a guide and index by which to interpret and enforce the treaty. How can it be discarded now? Bringing about this treaty was a long and painful labor of Mr. Adams, and no one can question his ability or his information on these subjects; and no one can pretend that he did not notice, observe and study every part and parcel thereof with the utmost care and caution.

Indeed it is questionable whether on this side or the other side of the Atlantic he had his equal in

this character of business; and he blessed the day of its confirmation, as one of the most remarkable and important of his life, ib. 274; as he did again when President Monroe on the 22nd of February, 1821, proclaimed the "acceptance, ratification and confirmation of this treaty and every clause thereof." (5 Adams, sup. 289.)

Then when the King of Spain ratified the treaty on the 24th of October, 1820, he asserts that he had seen and examined the sixteen articles of the treaty and had first obtained the consent and authority of the General Cortez of the nation with respect to the cession mentioned and stipulated in the second and third articles and he approved and ratified all and every one of the articles and clauses of such treaty, [See treaties and conventions United States and other nations, 1776–1889, published 1889 by State Department, p. 1022.] In his third annual message, President Monroe has this to say about the treaty. "The treaty itself was formed on great consideration, and a thorough knowledge of all circumstances, the subject matter of every article having been for years under discussion." [See Statesm. Man., Vol. 1, p. 412.]

So it seems these boundary articles underwent even a closer scrutiny than the others, and it cannot in truth be said they were incautiously or ignorantly adopted. It seems to have been then believed that these articles were the ones that would have to stand the test of time; they were fixed by Melish's map, well known and understood by the men who acted for both nations in this all-important affair. Greer county,

Texas, lying in and between the Red river and the so-called South Fork is the matter of contention here, and the Court is asked to take it from Texas and hand it over to the United States with remarks proper and suitable to the occasion. Greer county! Where, what, and how?

Why, Greer county in Texas, organized by Texas and controlled and managed by Texas as a part and parcel of her domain for more than a half century. Greer county, Texas, which lies many miles west of that very line which the high contracting parties solemnly agreed should be the fixed boundary between their respective sovereignties. What line? The line of the 100th meridian of longitude West from Greenwich. The actual line of said meridian to be measured and ascertained 100 years after the execution of the treaty? No, the line "as laid down upon Melish's map published at Philadelphia and improved to the year 1818."

Texas would be content to rest her case alone upon the facts herein discussed, confident that in a high court of equity there can be but one decision, and that decision totally adverse to the claim of complainant in this cause.

But it is averred that there was a great mistake in the treaty, and the utmost stretch in equity that can be given to the bill of complaint in this case is to construe it as an effort to correct a mistake in the work of the high contracting powers to the treaty of 1819 in fixing the boundary. Such mistake is averred but it is not claimed that one party practiced any deceit or fraud upon the other, and certainly

complaint could not be made that the United States was deceived or was the victim of any fraud, as it appears she persisted in asserting the line as it was fixed; and President Monroe congratulated congress when it was ratified, and Texas subrogated to Spain is not complaining, but she is satisfied to leave it as fixed. What then is the law upon this, one of the leading heads of equity jurisdiction? (Mistake): "Where the fact is equally unknown to both parties, or when each has equal information or means of knowledge; or where the fact is doubtful from its own nature, in every such case, if the parties act in good faith, a court of equity will not interfere.

Belt vs. Mehan, 2 Cal., 159.
McCobb vs. Richardson, 24 Me., 82.
Hunter vs. Gowdy, 1 Ohio, 449.
Wilson vs. Western, etc., 77 N. C., 445.
Hill vs. Bush, 19 Ark., 522.
Mason vs. Crosby, 1 Wood & M., 342; ib., 90, ib., 138.
Daniel vs. Mitchell, 1 Story C., 172.
Juzin vs. Toulmin, 9 Ala., 662.
Dambmann vs. Schutting, 75 N. Y., 55.
Webster vs. Stark, 10 Lea (Tenn.), 406.
May vs. Le Claire, 11 Wall., 217.
Baltzer vs. R. & A., R'd Co., 115 U. S., 634.
Farnsworth vs. Duffner, 142 U. S., 43.
Adams Eq. [7 Edn.], 166 et seq., notes.
Fonb. Eq. [116] and notes.

Here the parties had equal means of knowledge, and if the meridian on Melish's map was not correct,

that was unknown to one as much as to the other party; and no bad faith on the part of any one is asserted, and there can be no basis for this suit. But the authorities, all of them cited, show that if such a case be stated, it must be proved clearly and beyond all reasonable doubt. Here the case is not stated and the proof is not furnished. The application must necessarily fail.

And these same authorities are united that long acquiescence under the mistake and neither party aware of it cuts off any claim to correct the mistake. Here there was a period of thirty-three years of acquiescence and neither party aware of or pretending to know of any mistake.

Again, to entitle a party to a relief, either defensive or affirmative, for a mistake of fact, there are two requisites essential to the exercise of equitable jurisdiction. As stated by Pomeroy's Eq. Jur., Vol. 2, section 856 (1 Ed.)

"The fact concerning which the mistake is made must be material to the transaction, affecting its substance and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction is merely incidental, and not a part of the very subject matter, or essential to any of its terms; or if the complaining party fails to show that his conduct was in reality determined by it; in either case the mistake will not be ground for any relief, affirmative or defensive."

See Stone vs. Godfrey, 5 De G. M. & G., 76, 90.
Okill vs. Whittaker, 1 De G. & Sm., 83.

2 Phill, 338.
Trigge vs. Lavallee, 15 Moore, P. C., 270, 276.
Carpmael vs. Powis, 10 Beav., 36, 39.
Penny vs. Martin, 4 Johns Ch., 566.
Segur vs. Tingley, 11 Conn., 134.
Weaver vs. Carter, 10 Leigh, 37.
Trigg vs. Read, 5 Humph., 529.
M'Ferran vs. Taylor, 3 Cranch., 270.
Henderson vs. Dickey, 35 Mo., 120.
Paulison vs. Van Iderstine; 28 N. J., Eq., 306.
Dambmann vs. Schulting, 75 N. Y., 55, 63.
Stettheimer vs. Killip, 75 N. Y., 282.

It is therefore confidently submitted that complainant, by the record made, does not show herself entitled to avail even under the broad and sheltering protection of mistake, and by the record is left remediless even upon that ground.

What interest was the territory of Greer county, Texas, to the high contracting powers in 1819? How could the conduct of the United States in the negotiations and execution of the treaty have been in any manner affected by the fact as to whether the particular territory in dispute in this suit was to fall to her lot or otherwise by the terms of the treaty? These questions furnish their own answer; and the United States government cannot be heard now to say that mistake, if mistake it was, is not merely incidental and absolutely non-essential in its infinitesimal interest to any of the terms of the treaty, the conduct of neither party being in reality in any manner affected by such mistake. This being palpably so, it is a waste of the time of the Court to consume

it in further discussion upon this feature of the case. It is not impertinent to add, however, in conclusion, that Mr. Adams first demanded the line of 106 longitude as laid down in Melish's map. D'Onis offered the 94th degree. Adams came back with an offer to take 102 degrees. D'Onis replied with an offer of 100 degrees, which Adams promptly accepted—the whole according to the Melish map. (Supp. Rec. pp. 27-28). Melish's 102nd degree corresponds approximately to the 100th degree as fixed by Jones & Brown in 1857, and would have included the land in controversy—if it had been accepted. The acceptance by the United States of the Melish 100 line, under such circumstance, is a bar to any possible claim arising from mistake.

II.

In our view of the case, the voluminous testimony in the record, as to which stream—the North Fork or the South Fork—is the real Red river, and a search for the boundary line outside of Melish's map, is of no avail, for reasons already stated. Yet, as much stress is laid by complainant upon this feature of the case, we will address ourselves to the evidence upon that point, with a conviction amounting to certainty, that such evidence not only preponderates decidedly in favor of defendant, but establishes most clearly and convincingly the following proposition:

THE NORTH FORK IS THE MAIN RED RIVER, and a continuation of the main stream above its junction, so known and recognized anterior

and subsequent to the treaty, and never questioned until 1852. The South Fork is an independent stream with an independent name and designation, known at the time of the treaty and continuously to this day as the "Kecheahquehono" an Indian term signifying "Prairie Dog Town River," and regarded simply as a tributary of Red River until designated differently by Capt. R. B. Marcy in 1852.

In support of this contention we submit the following brief summary of the evidence in the record, relating thereto:

J. R. Crouch, a witness for the United States, says:

8xq. "In ordinary seasons is not the water in North Fork deeper than in South Fork?"

Answer. "I think it is."

9xq. "Is the water not wider in ordinary seasons in North Fork than in South Fork?"

"Answer. "Yes, there is generallly more water in North Fork in ordinary seasons."

10xq. "In ordinary seasons does not North Fork discharge a greater volume of water than South Fork?"

Answer. "Yes, I think it does." (Rec. 195.)

J. S. Elliston, witness for the United States, says:

6q. "Describe the difference between the North and South Forks of Red river, as to comparative width, flow and color of water, length of streams and area of country which they respectively drain."

Answer. "The South Fork is the widest river between the banks; it is as wide again as the North Fork. I don't know the difference in the length of the two.

"The North Fork flows more water than the South Fork; more water stands in the North Fork than in the South Fork, and stands there longer, but about

the same color. I can't tell the area of the country which the two streams drain."

The same witness on cross-examination, says:

1 x-q. "You have said that, judging by the width, you considered South Fork as main Red river. Now from your examination of the question and the evidences of travel along the North Fork, what river did the Spaniards and inhabitants sixty or seventy years ago know or consider as the main Red river." (Objected to by counsel for the United States.)

Answer. "It has generally been understood that the North Fork is the main Red river. All I could say is what I have heard older men say about the discovery of the two rivers, and that North Fork was discovered first and was the main Red river."

6xq. "Is it not a fact that on an average through the year North Fork flows a greater volume of water than the South Fork?"

Answer. "Yes, it does in anything like a moderate season."

7xq. "Is not the water in North Fork on an average during the year deeper than the water in South Fork?"

Answer. "Yes."

1st. q. Re-ex: "In which river is there a more general flow of water during the entire year?"

Answer. "North Fork." (Rec. 203, 204, 205.)

J. R. Byers, witness for the United States, says, in answer to q. 3, direct examination, among other things, as follows: "When it is dry the bed of South Fork is just a dry bed of sand, while North Fork is a small stream." (Rec. 211.)

John W. Clous, Major United States army, and a witness for the United States testifies in a general way as to the character of the two streams, but has no extensive personal knowledge of the rivers or country, inasmuch as he was only in the vicinity of the respective rivers a few times with military

scouting parties that stopped for only a few hours near the banks of the rivers. Major Clous admits his want of knowledge of the country when he says he never heard of the Kecheaquehono river. The witness states that he made notes of his observations of the country and that he has the same with him and has allowed counsel for the United States access to the same, but upon request declines to permit counsel for the State of Texas to inspect such notes. (Rec. 224. 237.)

William R. Livermore, an officer of the U. S. A., and witness for the United States, states that he was one of the commissioners on the part of the United States under the act of January 31, 1885, to run the boundary line between a portion of the Indian Territory and the State of Texas. His testimony is of rather a scientific character and based more upon comparison of the maps of different dates than otherwise. In fact, none of his testimony is based upon observation verified by him on the ground. (Rec. 270.) He admits that he assented, as a member of the boundary commission, to the statement that the South Fork was known and called prior to 1852 by the name of Kecheaquehono or Prairie-Dog-Town river, with the modification that it was also known as the Rio Blanco, and possibly by other names; and that such assent was made after a thorough examination of the subject. The witness also admits that the North Fork of Red river is as long or longer than the South Fork on the maps of Long, Carey and Lee of 1822, Marcy and McClellan in 1852, the Melish-Finlayson map of 1823; the witness states that the fork of Red river indicated on the Melish map of 1818 is the principal fork of Red river and longer than any other fork as shown on said map. (Rec. 271-272-273-274.)

Robert Creuzbaur, a witness for the United States, says he was a draughtsman in the Land Office of the

State of Texas, commencing in 1845, and as such prepared a map for publication known as the De Cordova map of 1849, which is marked exhibit No. 7. Witness admits an error as to the designation of the forks of the river and says that one fork is erroneously called Salt Fork. Mr. De Cordova, by whom the map was published, was a real estate agent at Austin, Texas.

Witness claims that the map was adopted officially by the State of Texas because certain members of congress and officers of the State of Texas certified to its correctness, but those certificates were only given for the purpose indicated by the testimony of Charles W. Pressler, who has been a draughtsman in the General Land Office of Texas for about 36 years and has charge of the maps and field notes of the surveys of that office. He says there was no official map of the State of Texas, and that the De Cordova was not so recognized; that the certificates of the officers of Texas, United States Senators and Congressmen were only intended as certificates that the De Cordova map was the most correct map of Texas then in existence, but did not have the effect to adopt it as the official map of the State. (Rec. 991-997.)

Mr. Creuzbaur subsequently made another map which was published and sold for the benefit of the publisher and himself and with which the authorities of the State of Texas had nothing to do, which is known as the Pressler map of 1867. (Rec. 278-292.)

Mr. Creuzbaur was subsequently called as a witness for the United States for the purpose of identifying what purports to be the Pressler map in the possession of S. M. Swenson in his office in New York City. (Rec. 330-352).

E. P. Swenson was examined as a witness for the United States for the same purpose and at the same time. (Rec. 348-350).

Lansing H. Beach, of the U. S. A., witness for the U. S., testifies generally concerning the maps and proceedings of the boundary commission of 1886, of which commission he was a member on the part of the U. S. His testimony is based upon such information as he has obtained from maps, and from his connection with said boundary commission. He states that he has never been on either fork of Red river. (Rec. 307-10).

Frank M. Maddox, witness for the U. S., says he has seen the North Fork filled with water but has not seen the South Fork filled from bank to bank—"the South Fork river bed is a wide sand bed, more like a sand bar than a river bed." Water can be reached by digging from one to three feet in the bed of the river. If you want to find water in the South Fork you must dig for it, "and when you find it and drink it, you wish you hadn't." (Rec. 332-333).

Charles E. Anderson, witness for the U. S., says that the South Fork of Red River is a bed of sand in dry seasons; that there is very little bank at all on the south side of the stream and that the water is very salty and is not drinkable by either man or beast. (Rec. 341).

W. N. Lawson, witness for the U. S., says he has resided in Greer county three years and that his statements as to the width and flow of water of the stream is guess work. (Rec. 335.)

B. K. Wood, witness for the U. S., says partly in answer to q. 13, "North Fork is fed by springs, and I never seen it without water. This Prairie Dog river, I've seen it for miles and miles and could not water a cow." (Rec. 364).

John Burdick, witness for the U. S., says in answer to q. 14: That the South Fork is very narrow, just merely a draw in the prairie, with holes of water standing along. Most of the holes run dry unless it is a wet season. There are some holes there that

stand nearly the whole year. "On the west side it is a level plain." The witness also confirms the statement of Witness Goodnight in answer to x-q. 16, which is to the same effect as his own testimony, just referred to. (Rec. 519-521.)

Rising Sun or Ta Ba Yerchen, witness for the United States, says that he never heard the Pea Pasa Hono, which is the Comanche name for Prairie Dog Town river, called the Red river. (Rec. 525-526.)

Tar Poney, or Hart Beat, witness for the United States, says there is more water in the Mobetia Hono, or North Fork, than in the South Fork, or Pea Pasa Hono, and that the latter has not very much water except in rainy times. Rec. 530-531.)

A. J. Meers was called as a witness for the United States and endeavors to contradict his former testimony in which he stated that he thought the North Fork of Red river was known to the Spaniards as the Rio Roxo, etc. (Rec. 576 et seq.)

Gen. R. B. Marcy in his deposition taken before the boundary commission in 1886 states that he is unable to resist the conviction that the stream now called North Fork of Red river was what is designated upon Melish's map as Rio Roxo, and he further states that Prairie Dog Town river was not known to civilized men prior to 1852, and that if it had ever been mapped he was not aware of it. That the character of the country through which Prairie Dog Town river flows is such that travelers would not have passed over it when there was a much more favorable route north of the North Fork. The water was bitter, not drinkable, and many of the men became sick from drinking it. The stream was only known to the Indians and possibly to some Mexican traders as the Kecheaquehono, which means Prairie Dog town river. (Rec. 930.)

Hugh F. Young also testified before said boundary commission that the respective prongs were

called North and South Fork of Red river by Capt. R. B. Marcy in 1852. Previously they were always called Red river (meaning what is now called North Fork) and Prairie Dog Town river (meaning South Fork). The boundary mentioned in the treaty followed Red river past what is now called South Fork of Red river, and on up the so-called North Fork of Red river. The South Fork was called by the Indians and foreigners Kecheaquehono, interpreted to mean Prairie Dog Town river, which is the name he knew it by in 1843, and ever afterwards. It was not called a fork but was regarded as a separate river, entirely different from Red river and always called by old settlers Prairie Dog Town river. The witness testifies to other important facts which will not be given in detail in this brief. (Rec. 936-937.)

To the same effect is the testimony of S. P. Ross, George B. Erath, Frank M. Maddox, and Will Lambert in their depositions taken before the said boundary commission. (Rec. 938-947.)

Three of the above witnesses, S. P. Ross, Hugh F. Young, and George B. Erath, are dead. (Rec. 958-1220-1232.)

Lawrence S. Ross, witness for the State of Texas and ex-governor of Texas, says that in locating for Major Van Dorn, what was afterwards named Camp Radziminski, he was guided by noted Indian chiefs and depended upon them to guide him to some point outside of the State of Texas and beyond Red river. He intended to cross Prairie Dog Town river, but was told by the Indians that this was not Red river and that Red river was beyond. These Indian chiefs and other Indians regarded the North Fork of Red river as the boundary of the State of Texas. He did not know these Indians ever heard of Marcy's line. They always called the South Fork Prairie Dog Town river. (Rec. 954-956-962-963.)

W. F. Cummins, witness for the State of Texas,

says he is State geologist and familiar with the country along the South Fork from its junction with Red river to its source, and for a distance of sixty miles from Palla Duro canon it would be utterly impossible for any kind of travel to go along the river except on the high plateau of the plains, and that it would be difficult for persons to descend to the river for water and supplies for said distance on account of the precipitous character of the canon, the same being over 400 feet in depth at its upper portion and 900 feet at its mouth, and even at the present day there are only a few trails where it is possible to get a horse up or down the bluffs, and only three places where wagons of any kind can go down into the canon, and these routes have been made by cattlemen at great expense in the last few years. The North Fork affords a very practicable route for travel, has no precipitous canon, and water can be obtained at definite distances. The water of the North Fork can be used from head to mouth without disagreeable results, while the water of the South Fork is unpalatable and can be used at no time without disagreeable results. Witness also states that the North Fork of Red river is the boundary between the U. S. and Texas. (Rec. 979-980-981.)

Charles W. Pressler, witness for the State of Texas, says he does not agree with Mr. Creuzbaur as to his representations about the forks of Red river, and testifies generally in regard to his own map, and states that the North Fork agrees best with Rio Roxo as laid down on Melish's map of 1818; that the South Fork was known to the Spaniards and Mexicans as Rio Blanco in 1788, which signifies White river, and to the Indians as Kecheaquehono, translated Prairie Dog river. The North Fork was known to the Mexicans and Spaniards as Rio Negro, Rio Tinto, Rio Colorado, and the earliest explorer calls it Rio de Las Plumas, and as Rio Roxo, or Red

river. (Rec. 994-995-996). The witness considers the North Fork the main fork and true Red river because it is the stream that has always been known by that name. (Rec. 1016.)

W. B. Kiser, witness for Texas, says the South Fork is the wider of the two streams, but it has been his observation that the North Fork contains the most water and that the North Fork is a permanent running stream from the junction of Elm river to its mouth. (Rec. 1018-1019.)

Jarret Todd, witness for Texas, says he made a personal examination of the two streams and the North Fork is the larger stream and contains the most water. The North Fork has forty tributaries, and the South Fork only twenty, and the names of these tributaries are given by the witness. (Rec. 1024.) This witness made a trip from the mouth of the Elm on the North Fork to its headwaters and thence across the country to the headwaters of the South Fork of Red river and thence down said South Fork to a bridge on the Mangum and Quanah road. He has testified fully concerning said trip and furnishes a verified diary of the same which is appended to his deposition, commencing on page 1039 of the Record. His testimony and said diary fully explain the character of the streams and the country along the same, and merit careful consideration. (Rec. 1023-1042.)

J. T. Settles, witness for the State of Texas, accompanied Jarret Todd on his journey along the streams and has signed the verified diary and also corroborates in his deposition the testimony of Judge Todd, and what he says is also worthy of great consideration. (Rec. 1042-1064.)

A verified statement, signed by Todd and Settles, is also appended to the deposition of the latter which has reference to the journey of these witnesses along the two streams, (Rec. 1065.)

George W. Briggs, a witness for the State of Texas, is acquainted with the forks of Red river and says the south prong is salty and the north prong fresh water above the mouth of Elm, and that the North Fork furnishes a larger volume of water the year round; that he has never seen the North Fork stop running but once, while the South Fork has been dry several times, and in the ordinary seasons in the absence of freshets the South Fork is usually a bed of sand and dry; that the bed of the South Fork is wider than it was twelve years ago which is caused by the freshets. (Rec. 1066-1067.) The witness also states that when he herded cattle on the South Fork water was obtained for them out of living springs and not from the South Fork itself because the cattle would not drink it. (Rec. 1068.)

S. C. Talley, Sr., witness for the State of Texas, says that Doan's is on the South Fork on the south side of the river in Wilbarger county, that the South Fork at the Doan crossing is a vast bed of sand about a mile wide and the stream of water in it is ordinarily from ten to twenty steps wide and about ankle deep to a horse. The banks of the stream have increased in width between the times the witness has crossed it within a year from 100 to 200 yards which was caused by the freshets. The North Fork is a very crooked river with bushes and trees along its banks, and is wider 75 miles up the river than it is nearer its mouth; from witness' observation he computes that the North Fork furnishes the most continuous flow of water, but he is not certain. (Rec. 1074-1076.)

James E. Pollard says he is acquainted with the Greer county country and visited it in 1859 in search of the remains of emigrants and merchants who started on a trip to California, with a lot of cattle, a great many of whom were captured and killed by the Indians or died on the trip. He was on both forks

of Red river on this trip and says the South Fork was known as Prairie Dog Town river. There was no water in the South Fork the first time he saw it; it had flat low banks, or scarcely any banks, to it and looked more like a sand beach than anything else. There was no water in it for thirty or forty miles and not enough to water the horses. It was necessary to leave the river every night to look for water. This witness states very fully the character of South Fork as compared with the North Fork, and gives practical answers to all questions on his direct and cross examination and we think well understood the character of the country and the rivers. (Rec. 1077-1096.)

J. T. Crabtree, witness for the State of Texas, says the South Fork is usually called Prairie Dog river and always went by that name when he first moved to Greer county; that it does not flow water continually and is dry except during rainy periods or freshets. The North Fork is more permanent in its flow of water and has only been dry or standing in holes once or twice since witness has known it; North Fork discharges a greater flow of water during the year than South Fork. [Rec. 1099.]

W. S. Pierson, witness for the State of Texas, says he was connected with a survey which required him to go up the South Fork, and that he found the stream like a sand bed. The North Fork, when he has seen it, always had running water in it, except upon one time, and the North Fork discharges a greater volume of water than the South Fork annually, and he states that the North Fork is a living stream and the South Fork is not. [Rec. 1102.]

W. E. Gates, witness for the State of Texas, resides near Navajoe in the bend of Red river or North Fork in Greer county. He says that during his residence there for a period of nine years, the North Fork has never been dry but water has been running

in it all the time,—plenty of water in it. The South Fork is in a low sandy country and has very little water in it, except in time of high rains, and witness has crossed it a number of times when there was not a drop of water in it—"when it was dry as a snuff box." [Rec. 1105-1106-1108.]

H. C. Sweet, witness for the State of Texas, says he made an examination of South Fork of Red river for a distance of about 65 miles by the meanders of the stream as District Deputy Surveyor, and the chain carrier followed right in the bed of the river and no water interfered with him. The bed of the stream was dry except occasional holes of water, especially at the mouth of small branches or creeks. The South Fork runs a stream of water only a short time after rains. The North Fork always has a stream of running water and witness has never crossed it in but one or two places where the water was not running. (Rec. 1112-1113.)

S. H. Tittle, a witness for the State of Texas, states that the North Fork affords more water the year round than the South Fork; the South Fork goes dry or nearly dry very often. It has water in it during the freshets but has no water in it half the time during the year; when it quits raining the water stands in holes in the South Fork unless it rains again; it is just a big sandy bed and all you can see there is a sand bed. The North Fork is the more permanent stream of the two. [Rec. 1121.]

J. H. Swindells, witness for the State of Texas, says he has resided in the State of Texas since October, 1850, and made surveys in what is now known as Greer county. He accompanied Major Van Dorn in 1858 when he established Camp Radziminski, and crossed Red river about where Prairie Dog river joins Red river. In 1858 what is now called North Fork was then called Red river, and witness never heard it called North Fork until 1870 or a little

earlier. What is now called South Fork was then called Prairie Dog river and he did not hear it spoken of at that time as the South Fork, but the term universally applied to it then was Prairie Dog river. What is called North Fork now was a pretty bold permanent stream then, with a good deal of water in it, while there was not much water in Prairie Dog river except during the time of excessive rains. The North Fork discharged at that day a greater volume of water than Prairie Dog river. (Rec. 1125-6-7-8.)

W. L. Cabell, witness for the State of Texas, states that he is a graduate of West Point, served in the U. S. A. in the Indian country and is well acquainted with the North and South Forks of Red river, and the country through which they flow; that in 1851 what is now called on the maps North Fork was called Red river, and witness never heard it called anything else. What is now called South Fork was then called Prairie Dog creek. The North Fork was recognized by army officers only as Red River and they were very careful about crossing it on account of the territory on the other side being in the State of Texas. The camps were always located on the east side of the North Fork and it was very rarely that any of the supply camps were placed west of it. At that date North Fork, or Red river as we knew it, was the biggest stream; that was the reason it was called Red river. He never saw a drop of water in Prairie Dog Fork unless it was raining, and the first prairie dogs he ever saw were in the bed of that creek and it derived its name from these animals. The North Fork was a permanent stream and always had water in it and was universally regarded by the army officers stationed there, who were acquainted with the country, as Red river, while the Indians only recognized the South Fork as Prairie Dog creek, This witness further

describes the rivers and country and shows that his testimony is based upon full knowledge of both, extending from 1850 down to the present time. (Rec. 1136-7-8-9-40-41.)

John Peter Smith, witness for the State of Texas, says he has resided in Texas since 1853 and has been acquainted with the section of the country in which Greer county is situated since 1858; that the universal designation by the people of the North Fork was Red river. He saw Prairie Dog river and crossed it in 1860. There was no water in it but it was a bed of sand about three-quarters of a mile wide. The water obtained by digging three or four feet was not fit for use. (Rec. 1154-1155-1156.) Witness also states that he has been about 75 miles above the mouth of Elm river on North Fork and found a very good flow of water in it. He crossed the North Fork near Fort Elliott and found a good flow of very fine water. (Rec. 1159.)

Richard Collins, witness for the State of Texas, says he is acquainted with the South Fork of Red river and its general tendency is to constantly widen on account of freshets. He never crossed the North Fork below the mouth of Elm except when it was knee deep with running water. (Rec. 1168-1169.)

J. B. Overton, witness for the State of Texas, says that his business is deputy sheriff, and that he is acquainted with parts of the South Fork, and that it is not usually covered with running water. That in May, 1888, he noticed a well near the center of the stream from which he drew water; the well was six or eight feet deep and used for the purpose of watering stock; the water was drawn with a windlass, pulley and rope. (Rec. 1170-1171-1172.)

Jonathan Doan, witness for the State of Texas, says he resides two miles west of the forks of the North and South Forks, on the southern fork, and

has been acquainted with both streams since 1875; and that the North Fork discharges the greater volume of water during the year; that he has never seen the North Fork when it did not contain running water at its junction; that he has seen the South Fork "lots" of times without running water at its junction, and when it was dusty "all the way up," and where the prongs came together there would be water in the North Fork; that the North Fork is a permanent stream of water. (Rec. 182-183.)

Thomas K. Carmack, witness for the State of Texas, says he knows the streams called North and South Forks of Red river; that he has never been on the North Fork which was always understood to be Red river; that in 1849 when he was in that section of the country the North Fork was called Red river and the South Fork Prairie Dog river; the Prairie Dog river is the wider of the two rivers but the North Fork carries the most water. (Rec. 1215-1216.)

H. P. Bee, witness for the State of Texas, has resided in Texas since 1837, and has held many prominent offices both civil and military. He says that he became acquainted with the upper waters of Red river in 1843 and that the North Fork of Red river was the Red river known by the people, by the Indians, and by the Indian guides at that time. (Rec. 1221-1222-1223.)

John S. Ford, witness for the State of Texas, has resided in Texas since June, 1836, and held many civil and military offices under the State government and as a commander of State troops became acquainted with the upper waters of Red river of Natchitoches. The witness states that upon an expedition he became acquainted with many Indian chiefs who were men of information and knowledge concerning the Red river country and whose names

are given by the witness. All of these Indians without fail put down the North Fork of Red river as Red river. This witness by mistake named Pease river as the South Fork, but subsequently corrected his mistake and states that he meant to refer to Kecheaquehono, instead of Pease river. (Rec. 1229-1230-1237-1239-1240.)

Jose Martinez, witness for the State of Texas, first heard of the headwaters of Red river in 1858 when he was with some Mexicans who were exploring the country for silver ore that they heard had been buried by some Mexicans on account of the Indians. The party struck the main Red river and went up it to the mouth of Otter creek, where they struck an old road. The Mexicans called the main Red river Rio Colorado de Natchitoches and the Americans always called it the Red river. What is known as the South Fork was then called Prairie Dog river. The South Fork is a running stream only when it rains a good deal or there is a big overflow. Some years it does not rain enough to raise the river. The North Fork runs more water than the South Fork, and witness thinks he may probably have seen the North Fork dry two or three times. [Rec. 1260-1261-1263-1264-1267-1268.]

William Kyle, witness for the State of Texas, has resided in Texas since 1844, and became acquainted with the upper waters of Red river in 1849 or in 1850 on an expedition with Gen. Burleson against the Indians. Placido, a Tonkaway Chief, and a man named Oliver were the guides to the expedition. The expedition crossed Red river near the Navajoe mountains. The Tonkaway Chief and Oliver gave the names of the forks of the river as Red river and Prairie Dog river.

Prairie Dog river was a large sand bed with no water in it, while Red river contained a considerable flow of water. Witness never heard the stream

which came from the North ~~River~~ called by any other name than Red river or Rio Colorado, while the Indians called Prairie Dog river, Kecheaquehono. (Rec. 1273-1274-1275-1276.)

William Ish, witness for the State of Texas, says he is acquainted with the region of the country known as Greer county, and knows that the town of Navajoe is situated near Red river; that the forks of Red river are situated 25 to 30 miles to the south of Navajoe and that said forks are formed by the north and south prongs and the north prong is called, or known, as main Red river, because it flows more water and always has water in it and has water in it when the south prong is perfectly dry. (Rec. 1283-1284.)

Richard W. Johnson, Brig. Gen'l. U. S. A. (retired), witness for the State of Texas, says he was stationed in Texas in 1858, and in that year visited the Red river country on an expedition under Major Earl Van Dorn, crossed Red river south of the forks and proceeded to Otter creek and established a depot of supplies known as Camp Radziminski; the witness examined the streams now known as North and South Forks and states that the eastern fork, or the one near Camp Radziminski, was called Red river and was regarded as Red river proper by the U. S. A. officers associated with witness in that expedition, and also by the Indians who inhabited that section of the country. The North Fork discharged the greater volume of water at that time. The South Fork was known to the Indians by a name which translated meant Prairie Dog river, and they always referred to the North Fork as Red river. (1291-1294-1295-1296.)

Thomas F. Roberts, witness for the State of Texas, says that he went with an expedition in command of Col. Cook up Red river in 1840 and traveled for a day up what is known as North Fork,

then crossed the river, came down on the south side and crossed what was called Prairie Dog river by Mr. Ivey, who then called what is now North Fork, main Red river. The witness never heard any other name at that time than Prairie Dog river and the only name then applied to North Fork was Red river. (1321-1322-1327-1328.)

N. B. Pearce, witness for the State of Texas, is a graduate of the military academy of West Point of the class of 1850, and was a Brig-Gen. in the Confederate service, and in 1854 accompanied Capt. Marcy in the exploration of Texas on the south side of Red river. Capt. Marcy had made an expedition two years previous to the upper parts of Red river and from him witness learned that the main source of water supply was received from what was then referred to as Red river, now called the North Fork. The South Fork was known by an Indian name, "Kecheaque-hono" or Prairie Dog river, and usually spoken of among the officers as Dry Fork of Red river. The officers in speaking of the North Fork called it Red river, and always regarded it as the main Red river. [Rec. 1343-1344.]

Simon N. Cockrell, a witness for the United States, says he has been acquainted with Red river since 1833, and struck it a short distance below the mouth of Prairie Dog river; the stream that ran down from the mountains was called Red river and had no other name. [Rec. 1347–8.]

Charles Corner, a witness for the State of Texas, is a civil engineer of large experience, and his testimony is important and merits great consideration. His knowledge of the respective forks of Red river is clearly established by his statements which are founded on his personal observation and professional services along the said forks. He demonstrates beyond doubt that the North Fork has a greater flow of water than the South Fork, and that its velocity

is greater; that the course of the river at the forks is imposed by the waters of the North Fork. [Rec. 1357-60-62-82.]

The importance of the statements of this witness cannot be overvalued, and in order to fully weigh his evidence his deposition must be carefully read. [Rec. 1357-1393.]

Henry L. Abbot, an engineer officer of the United States, was called as a witness for the United States, for the purpose of rebutting the testimony of Charles Corner. General Abbot has no personal knowledge of the forks of Red river or of the Red river country, and his answers are predicated upon his services in other localities and upon his experience upon larger streams. He admits that he never made observations on streams such as the North and South Forks of Red river, and that it would not require the same method of gauging that he adopted on the streams upon which he experimented. (Rec. 708-9.)

Capt. R. B. Marcy, in his report of his exploration of the route from Fort Smith to Santa Fe in 1819, used this language on page 217:

"About thirty miles north of our camp there is a sharp mound visible from the hills about here, and Beaver [his Indian guide] tells me that directly at the foot of this mound runs the Big Wichita, one of the principal tributaries to Red river, and that thirty miles in a northwest course from that mound the Red river forks; one branch coming from the west is called "Kecheahquehono," or Prairie Dog Town river, from the circumstance of there being a round mound upon the stream which has a prairie dog town on top of it. This branch rises in the Llano Estacado. The other, or northern branch, is the principal stream, which rises in the salt plains, near the head of Dry river."—(Sup. Record, p. 3)

As this Kecheahquehono, or Prairie Dog Town

river, was first baptized by Marcy in 1852 as "the South Fork or main prong of Red river," we quote extensively from his report of that year, styled "The Exploration of Red river."—[See Suplemental Rec., pp. 4-5]. This exploration was in obedience to the following order:

[Special Orders No. 33.]

"ADJUTANT GENERAL'S OFFICE,
WASHINGTON, March 5, 1852.

Captain R. B. Marcy, 5th Infantry, with his company as an escort, will proceed, without unnecessary delay, to make an examination of the Red river, and the country bordering upon it, from the mouth of Cache creek to its sources, according to the special instructions with which he will be furnished. On completing the exploration, Capt. Marcy will proceed to Washington to prepare his report.

Brevet-Captain G. B. McClellan, Corps of Engineers, is assigned to duty with this expedition. Upon the completion of the field service he will report to Brevet Major General Smith, the commander of the 8th department.

The necessary supplies of subsistence and quartermaster's stores will be furnished from the most convenient depots in the 7th or 8th military department.

By command of Major General Scott:

R. JONES, Adjutant General."

This officer, after mentioning the exploring expedition of Red river by Capt. Sparks, Mr. Freeman, Lieut. Humphrey and Dr. Custis, with seventeen private soldiers, two non-commissioned officers and a black servant, embarking from near Natchez, Mississippi, with instructions to ascend Red river to its sources, and after stating that the party had encoun-

tered many difficulties and obstructions, says that they were met by a large force of Spanish troops, the commander of which ordered them to proceed no further, and that therefore they were forced to turn back and abandon the enterprise.—Marcy's Rep. p, 2.

* * *

"Hence it will be seen that up to this time (1852) there is no record of any traveler having reached the sources of Red river, and that the country upon the head waters of this stream has heretofore been unexplored. * * Dr. Gregg, in his Commerce of the Prairies, tells us that on his way down the south bank of the Canadian his Comanche guide Manuel [who, by the by, traveled six hundred miles with me uppn the plains and whom I always found reliable] pointed out to him breaks or bluffs upon a stream to the south of the Canadian, near what we ascertained to be the true position of the head of the north branch of Red river, and where it approaches within twenty-five miles of the Canadian. These bluffs, he said, were upon the Rio Negro, which the doctor supposed to be the Washita river; but after having examined that section of the country I am satisfied that the north branch of Red river must have been alluded to by the guide, as the Washita rises further to the east. It therefore seems probable that the Rio Negro is the name which the Mexicans have applied to the Red river of Louisiana."—Marcy's Rep. pp. 4-5.

* * *

"Passing through the timbered land in the bottom we struck out across the valley and ascended the ridge dividing Red river from Cache creek."—ib. p. 9.

* * *

"May 22.—This morning, notwithstaning it was cloudy and the ground very far from being dry, we

made another effort to proceed. Still keeping the "high divide" we traveled in a westerly direction about eight miles when we turned north towards two very prominent peaks of the Wichita mountains, and continued in this course until we arrived in an elevated spot in the prairie where we suddenly came in sight of Red river directly before us."—ib. p. 13. [He is here speaking of the present North Fork.]

* * *

"May 26.—Red river [meaning present North Fork], which passes directly through the western extremity of the chain, is different in character at the mouth of Otter creek from what it is below the junction of the Kecheahquehono. There it is only one hundred and twenty yards wide; the banks of red clay are from three to eight feet high, the water extending entirely across the bed, and at this time [a high stage] about six feet deep in the channel, with a rapid current of four miles per hour, highly charged with a dull red sedimentary matter, and slightly brackish to the taste."—ib. p. 15.

* * *

"June 6.—Starting at 3 o'clock this morning, we crossed the river near our last camp, and passed over a very elevated and undulating prairie for ten miles, when we reached a large creek flowing into Red river (North Fork), which, in compliment to my friend J. R. Suydam, of New York City, who accompanied the expedition, I have called 'Suydam creek.'"—ib., p. 28.

* * *

"June 13.—Leaving the command this morning, encamped upon Sweet Water creek, I made a trip to Red river (meaning North Fork), which is about six miles in a southwest direction; it was 100 yards wide where we struck it, with but a very small portion covered with water, and very much to our astonish-

ment, for the first time, upon tasting it we found it free from salts." * * * "Along the whole course of Red river, from Cache creek to this point, we find three separate banks or terraces bordering the river, etc."—Marcy's Rep., p. 35.

* * *

Capt. Marcy, after exploring the source of Red river proper, then with his expedition turned south for the purpose of exploring Salt fork, crossing which stream, he reached the Kecheahquehono. We quote further from his report after reaching the latter stream:

"June 27.—Our route to-day has continued to lead us through dog towns, and it is probable that the fact of their being so abundant here, has suggested the name which the Comanches have applied to this branch of Red river of Kecheahquehono, or Prairie Dog Town river."—ib., p. 49.

* * *

After leaving Kecheahquehono and going east across the country to North fork again, the author says:

"July 12.—Red river (now called North Fork), above the mouth of Otter creek, which was at a stage above fording when we passed up, is now only two feet deep, and flows at the rate of about three miles per hour."—ib., p. 65.

* * *

"July 17.—We are encamped this evening upon a swiftly running brook, near a very cold spring of pure water, which affords a delightful contrast to the water we have met with upon the Kecheahquehono."—ib., p. 70.

Charles Corner, a witness for the State of Texas, testified, among other things, as follows:

"The course of the North Fork, immediately above

the junction, is south 6 east; that of the South Fork south 37 east; that of the united river, for some miles below the forks, is the same as that of the North Fork. The inference is plain that the North Fork is the dominant stream, for there is no good reason except lack of volume and velocity, why the South Fork should not have imposed its course on the waters of the North Fork." [R., p. 1363.]

Same witness further testified as follows:

51. x. q. "In your answer to the 16th question you referred to the manifest influence of the current of the North Fork upon that of the South Fork, do you refer to the fact that at the junction of the forks the stream proceeds more towards the south as governed by the North Fork, than to the east, as governed by the South Fork?"

51. Ans. "Yes."

52. x. q. "Is it not a fact that on the east of the North Fork there is a bluff which would turn the waters of the North Fork rather south than east if there were any water coming down the North Fork?"

52. Ans. "The bluff on the east bank of the North Fork could hardly influence the waters of the South Fork. At the junction and immediately below, I observed no appreciable difference in the two banks. I think the South Fork, if it flowed the stronger stream, would deflect the waters of the North Fork for some distance. This is not the case. A mile or so down the stream I observed bluffs to control the course of the united river. At the forks the course was evidently imposed by the waters of the North Fork. I noticed that the erosion of the right bank opposite the forks had been going on recently to a very great extent." [R., pp. 1381–2.]

Same witness further testifies as follows:

12 r. d. q. "Please examine the map of the United States referred to (map of the United States land

office) and measure your scale and state how much nearer the head of the North Fork appears to be to the 37th parallel of latitude than the head of the South Fork appears to be."

12 Ans. "60 miles nearer, as shown on the United States map."

13 r. d. q. "Which of these two streams, the North and South forks of Red river, as you found them on the ground, imposes its course upon the united river for some miles below their junction?"

13 Ans. "North Fork imposes its course upon the South Fork."—[R. p. 1387.]

Jonathan Doane, a witness for the State of Texas, and who had lived near the junction of the two rivers since 1875, testified as follows:

"I am about two miles from where the streams come together on the South Fork just three-fourths of a mile from the present bed of the river marked on this map, "Doane's."

19 q. "I understand from your diagram that South Fork connects with North Fork there running from west to east?"

Ans. "Yes, sir, running pretty nigh east."

20 q. "North Fork at the connection runs nearly south?"

Ans. "Nearly south."

21 q. "And then south of the confluence of the two rivers it still continues on in a southerly direction?"

Ans. "Yes, sir, and runs on then in a southerly direction a little east of south about seven or eight miles and then it takes off in nearly an eastern course."—[R. p. 1183.]

The above testimony establishes the following proposition, to-wit:

1. The North Fork of Red river is the main Red river and a continuation thereof, and was known as

such by the Indians, Spaniards, Mexicans and others at the time of and long prior to the publication of the treaty map of Melish of 1819, and it has been known and regarded as such by the army officers stationed in that locality at all times.

2. What is now designated as the South Fork of Red river has always been known as the "Prairie Dog Town river" and was not known by any other name prior to its discovery by Marcy in the year 1852.

3. The North Fork rises in the mountains, is fed by many springs and forty tributaries, has greater velocity, a larger and more continuous flow of water and is never a dry or stagnant stream below the mouth of Elm creek; and inasmuch as it is not shown that river is ever dry at or below the junction of the forks, the North Fork furnishes the flow of water which runs in Red river below said forks, for the evidence clearly shows that the South Fork, or "Prairie Dog Town river" is dry from its junction for many miles up, if not entirely to its source, for about two-thirds of the time during each year, and as a matter of fact only affords water as a running stream in times of heavy rains or freshets.

4. The South Fork is a sand bed and absolutely dry the greater portion of the year and affords the prairie dogs a comfortable home, and it takes its name from these animals. It has about twenty small tributaries, and unlike the North Fork its waters are not palatable to man or beast.

5. The preponderance of the evidence clearly establishes the fact beyond question that what is now

called the North Fork has at all times been known and regarded as main Red river.

Now, as to the law applicable to these facts so established. Fortunately for the State of Texas this Court laid down the law governing this question, and only five years after the consummation of the treaty involved in this controversy. In the case of Doddridge vs. Thompson et al. (9 Wheat. Rep., 469), decided in 1824, this Court was called upon to determine as to which branch of two streams should be considered the main branch, and laid down the law as follows:

"The territory lying between two rivers is the whole country from their sources to their mouths; and if any branch of either of them has not acquired the name exclusive of another, the main branch to its source must be considered the true river."

The necessary implication of this principle, so established in said decision, is, that if either branch of a stream has acquired the name of the main stream, exclusive of the other, then such branch so acquiring said name must be considered as the true river. In view of the record thus submitted, there can be no controversy that from "time whereof memory of man runneth not to the contrary," that particular stream which the United States in this case has designated as North Fork of Red river is and was known of all men as Red river proper. And it is equally clear that up to 1852, when Captain R. B. Marcy, under orders from his government, to explore the sources of Red river, went upon the field of his action he knew and recognized said stream as Red river and

proceeded to carry out the orders of his government by an exploration to its sources. It is equally clear and manifest from the record, so claimed by Marcy and so far undisputed, that the Kecheahquehono or Prairie Dog Town river was up to 1852 an unknown stream to white men, he claiming its first discovery. Yet, the record abounds with facts indubitably showing that the Indians, Mexicans, trappers and travelers of that region knew said stream long before Marcy made his discovery, and that for all time it bore the name of "Prairie Dog Town river" and was never known or designated in any manner as a part of Red river. The deduction is plain, from the evidence, that more than thirty years after the treaty, the United States of America, by a change of geographical names well defined and well understood up to that time, has made such change the basis of a claim for territory which was never hers and which she had expressly ceded to a friendly power by a solemn treaty of boundaries. Can such a claim be sustained in a court of equity, founded, as it is, upon so absurd a basis? The testimony of General Johnson, of General Cabell, of Marcy, himself, and of a long list of old citizens of Texas, who have been inhabitants of her borders from 1833 up, all show that North Fork of Red river is and has always been recognized as the Rio Roxo of the treaty, and this claim was never disputed until within the memory of the present generation. If the ancient land marks are to be disturbed, can any boundaries be fixed? If, by the change in the name of a stream, or the moving of a meridian, the just and lawful territory

of States can be encroached upon, how shall it end? It is of most potent significance that General Marcy who is responsible for the origin of this claim upon the part of the United States government, by an honest mistake on his part, before his death, was able to do justice, and took pleasure in so doing. In his testimony before the joint boundary commission in 1886 this distinguished officer of the United States government testified so fully and freely upon the subject and did such full justice to Texas that we must be pardoned for making liberal quotations from his statement, under oath. He says:

"I regarded the Prairie Dog Town branch as the main Red river, for the reason that its bed was much wider than that of the North Fork, although the water only covered a small portion of its bed, and as the sandy earth absorbed a good deal of water after it debouched from the canon through which it flows, it may not contribute any more water to the lower river than the North Fork. The Prairie Dog Town branch and the North Fork of Red river, from their confluence to their sources, are of about equal length —the former being 180 miles and the latter 170 miles in length.

"For reasons which I will presently state, I have been unable to resist the force of my own convictions, that the branch of Red river that I called the North Fork of that stream, was what is designated upon Melish's map as Rio Roxo. I doubt if the Prairie Dog Town river was ever known to civilized men prior to my exploration in 1852; and, if it was ever mapped before then, I am not aware of it.

"The character of the country through which this stream flows is such that travelers would have not likely passed over it when there was a much more

favorable route north of the North Fork. The water in the Prairie Dog Town branch, from its confluence with the North Fork to within two miles of its head spring (about 100 miles), I found so bitter and unpalatable that many of the men became sick from drinking it. But one pool of fresh water was found throughout the entire distance, and the Indians told me they never went up this stream with their families if it could be avoided, for the reason that the nauseous water frequently proved fatal to their children. Hence, it is not surprising that but little, if anything, should have been known of this repulsive region before my exploration in 1852. And this, probably, accounts for the entire absence of most of its southern branches upon Melish's map. It is very certain that the Prairie Dog Town river was never delineated by any Spanish, French or English name, as were the most of the other streams in that country, and it was only known to the Indians, and possibly some Mexican traders, as Kecheahquehono, a Comanche appellation, the signification of which the Delawares informed me was 'Prairie Dog Town river.'" * * * "As before stated, owing to the absence of good water, the sandy character of the soil along the river, and the formidable obstruction presented by the elevated and wide spur of the staked plains, and the extensive belt of gypsum crossing this route, the Mexicans would never have attempted to traverse it with their carts in their trading expeditions from Santa Fe to Nacogdoches, especially when there was so good a route a little farther north, possessing all the requirements for prairie traveling. The Rio Roxo, upon Melish's map, is almost entirely south and west of the Wichita mountains, but in close proximity to them, which is in accord with my determination of the position of the North Fork, while there are no mountains upon the Prairie Dog Town branch. The head of the Rio Roxo upon Melish's

map, is put down as in the latitude 37, while upon my map the true latitude is 35½, while the Prairie Dog Town river rises in about thirty-four and one-half degrees, so that, if his Rio Roxo was intended to represent the Prairie Dog Town river, it would be two and one-half degrees too far north." [R., p. 930.]

Marcy, in his map of 1852, accompanying his report, defines the boundary line between Texas and the Choctaw Nation, according to 100th meridian, as established by McClellan, and gives Texas very much more territory than she claims. (See map.)

We do not care to take up the time of the court in useless discussion of the characteristics of a river, as to its volume, area, drain, etc., etc. Such course is wholly unnecessary in view of the evidence and of the law. The North Fork was known as the continuation of Red river at the time of the treaty, and for more than a generation afterwards. It had acquired this name exclusively to its source, and it is a waste of effort now to inquire which is the main stream above the confluence of the two. The work was done in 1819 by the high contracting powers. It can not be undone now, even under the broad and far-reaching powers of a court of equity.

III

The stream now called North Fork corresponds, approximately, and most nearly with the Rio Roxo, as delineated by Melish on his map of 1818, with reference to other permanent natural objects delineated upon said map, and as found upon the ground.

A large number of maps have been offered in evi-

dence and filed with the record by complainant, a number of which have been printed in the record, and the others duly mounted and filed with the record but not printed therein, [See last page of complainant's brief for list of said maps.] The map of Melish of 1818, does not contain a delineation of the south fork of Kecheaquehono river, nor of any other streams emptying into Red river from the south. It is evident from this that none of these streams having their sources in the south or in the west were known, at least, to the map-maker, although Melish, in his descriptive pamphlet accompanying his map, shows that he had exhausted every possible source of information, regardless of expense, in making his map as accurate as was possible at that time and under the circumstances. This map was made after Humboldt's expedition, and after the appearance of Darby's map and after an inspection of the manuscript of Bringer who had made a very accurate survey west of the Mississippi river to 23d degree from Washington. And even then, after the map-maker had obtained access to Lieutenant Pike's notes of his expedition of 1806, he erased all the old data from the plates and inserted the corrected data from these sources. The North Fork of Red river substantially agrees with Melish's Red river. It rises in a region westward from the point beginning on said river and westward of the point where Melish's map fixed the 100th meridian, along a chain of mountains. General Marcy, while testifying before the joint boundary commission and immediately after

he had examined Melish's map, or a section thereof, for the first time, testified as follows:

"Upon this map only one large fork of Red river is delineated, with one more northerly small affluent, which is not named, but may have been intended for the Washita river or Cache creek. But none of the important southern tributaries, such as the big Wichita, Pease river, and the Prairie Dog Town river, are delineated thereon, unless the stream marked as the Rio San Saba is designed for the Prairie Dog Town branch; and as the real Rio San Saba of Texas is 500 miles, or thereabouts, distant from this locality, it does not seem improbable that if the maker of the map had any vague conception of the existence of such a stream as the Prairie Dog Town river, he might have intended this as such. It certainly was, as far as the section of the map shows it, nearly in the direction of that branch of Red river, and is put down as rising near the eastern border of the staked plain, but the small section of the map does not show where it runs." * * * "The Rio Rojo, or Roxo, upon Melish's map, is almost entirely south and west of the Wichita mountains, but in close proximity to them, which is in accord with my determination of the position of the North Fork, while there are no mountains upon the Prairie Dog Town branch. The head of the Rio Roxo, upon Melish's map, is put down as in latitude 37 degrees, while upon my map the true latitude is 35½ degrees, while the Prairie Dog Town river rises in about thirty-four and one-half degrees, so that, if his Rio Roxo was intended to represent the "Prairie Dog Town river," it would be two and one-half degrees of latitude too far north." (R. p. 930, et seq.)

William Ish, a witness for the State of Texas, testified as to these mountain ranges as follows:

"33. Q. State whether or not you have noticed the general course of the mountain range known as the Wichita mountains?

A. I have.

34. Q. What have been your opportunities of seeing the general course of the ranges of those mountains in respect to the points of the compass?

A. I have hunted over that country a great deal.

35. Q. From the Navajoe mountain, what is the course of the mountains, looking both ways?

A. The Wichita mountains east from Navajoe run in a southerly direction for about 15 miles, I suppose. Then they run northeast a piece from there up to near Ft. Sill.

36. Q. From Ft. Sill what course on the northern side of the range does it run?

A. I cannot tell you.

37. Q. From the most southern point of those mountains, how far is it, as near as you can state, across the mountains, going north?

A. It is about 5 to 15 miles.

38. Q. How far have you seen those mountains up the North Fork of Red river in the general course of that river and near it? By near it, I mean within a few miles of it?

A. I have seen them to the foot of the plains: I suppose 140 to 150 miles from Navajoe mountain, counting the two counties, Donley and Collingsworth, as 35 miles across each and Greer 80. This measurement is all guess work.

40 Q. Do you mean to say that they extend across Donley and Collingsworth counties?

A. Yes sir, it is the same range of hills, but they get smaller as you get close to the plains.

41 Q. Do you know of any other range of mountains running off from those you have just spoken of in another direction? If so, state what you know of them and and their location?

A. There is a range of mountains running in a northerly direction from the range I have just spoken of and up Elk creek or near Elk creek, for sometimes some of them are five or six miles from the creek, but they are known as the Elk creek mountains. Those mountains run up Elk creek some 40 or 50 miles up to or near the divide between Elk creek and the Washita there is a range ofmountains running in a northerly direction that looks to be from 40 to 75 miles—a range of mountains as far as the eye could see—mountains or hills.

42 Q. Looking from Navajoe mountain, what is the general course of the mountains that you have seen to the westward of that mountain?

A. It is northwest, almost west.

43 Q. Please state if there is any bend in the course; an if so, state what are the courses which the range pursues from Navajoe mountain?

A. The mountains run in a westerly direction and then make a little turn northward and run northwestward, and in Collingsworth county they turn almost directly west. That is my recollection. I have been on the mountains many a time. I was not taking courses when I was on the mountains." [R. p. p. 2285-6.]

Charles Corner, a witness for the State of Texas, testified as follows:

"37 Q. On the certified copy of Melish's map, marked Exhibit G, in your deposition is marked the meridian of the 100th degree of west longitude. What great natural landmarks, if any, on Melish's map, indicate the situs or location of that meridian in the region between the Arkansas and Red rivers and at its intersection with those rivers?

37 A. The intersection of the 100th meridian as laid down on Melish's map falls immediately west of the great bend of the Arkansas river. I know of

no point on Red river at its intersection which may be identified on Melish's map. In the country between the Red river and the Arkansas, along the line of Melish's 100th meridian, I have not observed any great natural land marks which it crosses.

38 Q. You are not by the last question asked to indicate the land marks directly on the line. State what great natural land marks, either to the east or to the west of that line, would indicate, or that do indicate, its position or general locality on the face of the country as the same is known to you?

38 A. The great north bend of the Arkansas, the whole course of the Arkansas river from the apex of the south bend to the mouth of the Salt fork in the Ponca reservation, the great south bend itself, the bends of the Arkansas at the mouth of the Salt fork, and the actual forks of Red river, all as shown in my Exhibit B, determine the location of the 100th meridian severally and collectively within very narrow limits.

In identifying a tract of land I am guided in this statement, as always, by the first consideration of defining its outside boundary or periphery. This I have done; and these great natural landmarks bound and contain the region to which your question refers.

If the superposition which is a part of Exhibit B, be made on either of these great natural landmarks or upon their evident correlation, the 100th meridian of Melish cannot be otherwise than clearly located upon the tract of country lying between the Arkansas and Red river.

I have also examined the photograph of Melish's map for any other possible location of his 100th meridian. I find it completely tied to these marks. Even seeking a possible location in another section of the map, obviously compiled from different sources, and therefore from the point of view of a geographer not referable to the region covered by my

answer, I am unable to find any argument against the absolute location of the 100th meridian by the landmarks I have mentioned.

The longitude of the city of San Antonio as shown on another section of Melish's map is approximately correct. Its relation to the great natural landmarks on the coast, to-wit, the mouth of the Guadalupe, the Colorado, and the Brazos, disclose errors of 100, 50, and 30 per cent respectively of the distances as shown on Melish's map.

It is therefore impossible to establish the 100th meridian of Melish from any point in the southern portion of his map. On the other hand, that the 100th meridian of Melish should be located just west of the great bend of the Arkansas is very clear. That the fact of its location there must be patent to everybody possessing Melish's map cannot, I think, be gainsaid. I will illustrate my position and the importance I attach to this landmard as follows:

A traveler, a trader, or a trapper going west from St. Louis would have to inform himself as to his location. He would want to know whether he had left his country or not. If he had a Melish map, however simple a man he might be, he would be able to determine this fact with quite sufficient accuracy on his arrival at the great bend of the Arkansas.

It appears to me to be in the nature of a sign post in its relation to the 100th meridian of Melish.

39 Q. If you superpose the forks of Red river of Melish's map as represented in Exhibit B upon the forks of Red river of the map made by you from actual observation and partly from the U. S. map on the other sheet of Exhibit B, how then will the 100th meridian of Melish's map fall in reference to the forks of Red river?

39 Ans. It will fall 65 miles east of the forks of Red river by such superposition.

40 Q. Superposing the south bend of the Arkan-

sas river represented by Melish's map, as shown in your Exhibit B, upon the south bend of the Arkansas river, as shown on the other sheet of Exhibit B, how then does Melish's map show the 100th meridian in respect to the forks of Red river?

40 Ans. In that case it would fall about 45 miles east of the forks.

41 Q. If you superpose the peculiar bends of the Arkansas river at the mouth of Jefferson river, as shown on the Melish part of your Exhibit B, upon the bends at the mouth of the Salt fork of the Arkansas, as represented on the other sheet of your Exhibit B, how, then, will the 100th meridian of Melish's map fall in reference to the forks of Red river as represented on the map showing the forks as you found them?

41 Ans. By making this superposition the 100th meridian of Melish falls about 54 miles east of the forks of Red river.

42 Q. How if you superpose the North bend of the Arkansas?

42 Ans. By making that superposition, the 100th meridian would fall about 18 miles to the east of the forks of Red river.

43 Q. Now, if you superpose the intersection of Pike's route with the Arkansas river, how then would it fall?

43 Ans. It would then fall about 36 miles to the east.

44 Q. Now, if you superpose by the average correlation of these several land marks and compare the two maps, how, then, will the Melish 100th meridian fall in reference to the actual forks of Red river?

44 Ans. About 48 miles to the east.

45 Q. Is it or not possible that a line for the 100th meridian may be located as laid down on Melish's map and yet lie west of Greer county, Texas?

45 Ans. It is not possible to locate the 100th meridian west of Greer county, Texas, without violating all the land marks which determine it.

46 Q. Is it or not possible that a line for said meridian may be located west of the forks of Red river, as laid down on Melish's map?

46 Ans. It is not possible." (R. pp. 1371-2-3.)

See to same effect, testimony of C. W. Pressler. (R. p. 991 et seq.)

The Court will observe from the testimony of this witness, to which we again call attention, for its thoroughness and completeness, that he, the witness, has made a personal and scientific examination of the country between the Red river and the Arkansas, with thorough information as to the terms of the treaty, the different maps in existence at the time and subsequent, and with the itinerary of Pike and Humboldt and others, and his testimony is most cogent in establishing the proposition herein contended for.

The map of Melish is also before the Court for its own inspection,and it will be borne in mind that during the progress of the negotiations between Mr. Adams and Mr. De Onis, the Spanish minister, that the great bend of the Arkansas was a prominent feature in the mind of the secretary of state at the time of said negotiations. In his communication to Mr. De Onis on February 6, 1819, only a few days before the consummation of the treaty, and when Mr. Adams was insisting upon the 102 of longitude, he submitted the following article as a projet for the treaty:

"Article. It is agreed that the western boundary between the United States and the territories of

Spain shall be as follows: Beginning at the mouth of the river Sabine on the Gulf of Mexico; following the course of said river to the 32nd degree of latitude, the eastern bank and all the islands of the river to belong to the United States, and the western bank to Spain; thence due north to the northermost part of the 33rd degree of north latitude and until it strikes the Rio Roxo, or Red river; thence following the course of said river to the northermost part of the bend between longitude 101 and 102; thence by the shortest line to the southermost point of the bend of the river Arkansas between the same degrees of longitude, 101 and 102; thence following the course of the river Arkansas to its source in latitude 41 north, &c., &c. * * * The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818."

These points, the northermost bend of Red river and the southermost point in the bend of the Arkansas between meridians of longitude 101 and 102 as laid down by Melish, speak for themselves, upon inspection, and when taken in connection with the cogent and convincing testimony of the witness, Corner, the Court will have no difficulty in reaching a conclusion in absolute accordance with the proposition laid down.

The Melish 100th meridian cannot be torn from its moorings without doing violence to every principle of topography and without overriding all the land marks established by nature herself upon the face of the country, and which were recognized by the makers of the treaty.

IV.

The King of Spain asserted his proprietorship of the territory in dispute by repeated acts of governmental ownership for nearly one hundred years before the treaty of 1819; and since her independence, Texas has likewise asserted her ownership of said territory, and has persisted in such assertion down to the present day by acts of government, of legislation and of occupancy. No governmental act of the State can be tortured or perverted into acquiescence on her part in the claim of the United States. To the contrary the government of the United States has recognized the right of Texas to the territory in dispute by solemn acts of government and is now estopped to claim the same or any part thereof.

That the Spaniards knew and claimed the particular section of country in controversy by acts of possession and of ownership, is beyond question from the record. This record abundantly shows, apart from the general history of the country, which of course is before the Court, that for many years anterior even to the treaty of 1819 every attempt on the part of either the French or the Americans to penetrate this particular section of country, was met promptly by a hostile force of Spanish soldiers, and either driven from the country or made captives. The early records of the War Department abundantly attest also that at an early date the Spaniards were at war with the Indians, and especially with the Comanches, who occupied this particular strip of country. (See report of Col. W. A. Trimble, 8th Regiment, U. S. A., to Hon. J. C.

Calhoun, Secretary of War, under date August 7th, 1818, Sup. Rec. p. p., 2-3.)

Even in 1806, when Lieutenant Pike was preparing for his expedition for the purpose of exploring the sources of Red river, his movements were watched by Spanish emissaries, and in the end he was captured and transported back to the United States, without accomplishing the main purpose of his expedition. In his report of his explorations, he uses these words:

"I was fitting out for my expedition from St. Louis, when some of the Spanish emissaries in that country transmitted the information to Maj. Nerior, and the Spanish Consul at that place, who immediately forwarded on the information to the then Commandante at Nacogdoches (Capt. Sebastian Rodereques), who forwarded it to Col. Cordeso, by whom it was transmitted to the seat of government. This information was personally communicated to me as an instance of the rapid means they (the Spaniards) possessed of transmitting the information relative to the occurrences transacting on our frontiers. The expedition (of Lieut. Malgares, from Santa Fe) was then determined on and had three objects in view, viz:

1. To descend Red river, in order that if it met our expedition to intercept and turn it back; or should Maj. Sparks and Mr. Freeman have missed the party from Nacogdoches under the command of Captain Viana, to oblige them to return and not penetrate further into the country, or make them prisoners of war.

2. To explore and examine all the interior parts of the country from the frontiers to the province of New Mexico on the Missouri.

3. To visit the Tetaus, Pawnees Republic, Grand

Pawnees, Pawnee Mahaws and Kans. * * Lieut. Don Facundo Malgares, the officer selected to command this expedition. * * * This officer marched from the Province of Bisco with 100 dragoons of the regular service, and at Santa Fe he was joined by 500 of the mounted militia of that province. The whole number of their beasts were 2075. They descended the Red river 233 leagues, met the grand bands of the Tetaus; held councils with them, then struck off to the northeast across the country to the Arkansas, where Lieut. Malgares left 240 of his men with the lame and tired horses, whilst he proceeded on with the rest to the Pawnee Republic."

Sept. 22, met a Pawnee hunter who informed us that a party of 300 Spaniards had lately been as far as the Sabine, but for what purpose unknown." (Pike's Diary, p. 143 et seq.)

In May, 1541, Coronado made an expedition into the same country. (R. 730.)

In 1601, Governor Onate, of New Mexico, marched with 80 men in search of Quivira over the same country. (R. 730.)

Again in 1611 this same Spaniard made another expedition to the east from Santa Fe. (R. 731.)

In 1719, Val Verde, with 105 Spaniards and 30 Indians also marched from Santa Fe against the Comanches on the head waters of Red river and went as far as Colorado and Kansas. [R. 731-2.]

Other expeditions were undertaken by Bustamente in 1722, by Mendosa in 1743, by Parrilla, by Commandante General Croix in 1778, by Col. Juan Bautista de Anza in 1778. [R. 732, et seq.]

In August, 1789, M. Louis Blanc, Commandante at Nacogdoches, writes to General Ugarte urging the

opening of trade between New Mexico and Louisiana, by establishing a presidio among the Jumanas, stating that the journey with freight was only forty days, through a *fertile country*. Pierre Vial and a party had recently made the trip. [R. 735.]

On March 21st, 1801, the expedition of Philip Nolan from near Natchez were attacked by a troop of 150 Spaniards sent against them by Sal Sedo, and commanded by Lieut. Musquez and were carried captives to the city of San Luis Potosi. [R. 736.]

The record in the case, from page 730 to 930, inclusive, contains a most interesting history and account derived from various sources of the permanent occupation of all the Red river country, including the particular territory in dispute by the Spaniards. And to this record we direct the attention of the Court, without further quotation, and especially to the reports of Col. Mesieres, who was a most active officer for many years on that frontier, and who, the record shows, established lines of communication between Santa Fe and Nacogdoches and several military posts along the line of principal Red river, including stopping places for travelers, which Baron Humboldt found on his expedition many years afterwards. This evidence in the record establishes beyond peradventure the full exclusive occupation of the territory in dispute by the Spaniards previous to the treaty.

In addition to this there is evidence in the record by living witnesses who were cognizant of the fact that an extensive trade was carried on between Santa Fe and Nacogdoches from a very early day

until the independence of Texas in 1836, and perhaps for a few years thereafter. This trade was carried on over what was known and recognized as the great Spanish road between Santa Fe and Nacogdoches; or, as it was called in Texas, the "Santa Fe road," which road was in existence and in use at the time of the boundary treaty and prior thereto. This road led from Santa Fe to the headwaters of the North Fork, and down the North Fork, crossing Red river and passing east south of that stream to Nachitoches and Nacogdoches. It may be remarked that this road has no connection with the treaty boundary, but its establishment in evidence, as has been done, indicates indubitably the fact that what is now North Fork was then the only stream known to the people and travelers at that time as the continuation of Red river. This road nowhere crossed or approached the Kecheahquehono, or Prairie Dog Town river, and consequently this stream was not then known except probably to the Indians in its locality. That this road had an existence is evidenced by the numerous maps introduced in evidence by complainant. It is true Melish's map of 1818 does not delineate the road, but the Melish-Finlayson map of 1823, does, and styles it "Great Spanish road" and "Road to Red river." The map appended to Maillard's History of Texas, 1841, shows this road very plainly and styles it "The Great Spanish Road to Red river." Cary & Lea's map of 1822 also shows this road. Maj. Long's map of his expedition shows this road and calls it the great highway between Santa Fe and Nacogdoches. Young's map of Texas,

of 1836, also lays down the great Spanish road to Red river. The Spanish road is also partly shown In Exhibit B to Cummings' deposition (R. pp. 984-5.) These maps were all made and published prior to any controversy between the United States and Texas as to the title of Greer county, or as to the boundary line fixed by the treaty of 1818. They are therefore the more effective as evidence in this case. It is not contended that these maps are perfect, but they demonstrate very clearly that in those early days there was a traveled way, much used, between Santa Fe and Nacogdoches, established by the Spaniards and running along what is now called North Fork of Red river. In addition to the maps in evidence many witnesses have testified either from personal knowledge or from tradition as to the existence of this trail or Great Spanish road, and the Court is now asked to weigh and consider a brief of such testimony, to-wit:

C. F. Doan, a witness for the United States, knows of an old Mexican trail that ran east of the North Fork, but he never paid much attention to it. (R. p. 360.)

Cassimiro Romero, a witness for the United States, says he has been acquainted with the country since he was a small boy, and testifies about an old road that was called the Santa Fe trail in early days, and also Buffalo trail. (R. p. 424.)

Shot-In-The-Foot, alias Nasthoe, a Wichita Indian chief, called by the United States, testifies, that he was told by an old man, now dead, that the Mexicans came from the West, away out West, with donkeys

with packs on their backs, and traded with the Indians; that white men, real white men, came from the East and traded with the indians, and these were the first white men that appeared in that country. (R. 629-30.)

Chaddle-Kungky, or Black Goose, a Kiowa Indian, is to the same effect. (R. p. 658.)

George W. Briggs, witness for Texas, described what has always been called an old Spanish trail. (R. p. 1067.)

Witness says he asked some Indians about this trail about twelve years ago, and Quanah Parker told him the trail was made before he could remember, and said he had heard his forefathers talk about when people used to travel there. The conversation occurred while Parker and witness were traveling on the old trail. (Rec. 1070-1.)

W. E. Gates, witness for Texas, says he knows the trail for only a short distance. "The Old Santa Fe" trail crosses Otter creek about six miles from the mouth of Otter; it goes through a gap in the mountains near the narrows." Witness describes the part of the trail over which he has traveled. (Rec. p. 1106.)

Thos. K. Carmack, witness for Texas, says he was on an expedition in the Red river country and traveled on what was said by the men to be the Old Santa Fe trail. [Rec. 1213.] It was a very old trail—not an Indian trail—and where the mesquite grass was thick it was not visible. [Rec. 1213.]

John S. Ford, witness for Texas, says that in addition to Indian evidence there were men who well

acquainted with the country and from what they said he concluded there was an old road that led up and down Red river and finally to Santa Fe. (Rec. 1236.)

Jose Martinez, witness for Texas, says he is well acquainted with the head waters of Red river or North Fork, and knows about the old road which he struck near Otter creek. The road was plain in some places and not visible in others—it was a very old road and good sized mesquite trees and grasses also were growing in it. (Rec. 1261-62.)

Wm. Ish, witness for Texas, says he knows a very old trail or wagon road leading down Otter creek, which he traveled and examined and from appearances it seemed to have been there many many years. There are growing in the middle of the road mesqulte trees from six to twelve inches in diameter. The mesquite trees are of slow growth and their appearance in the middle of the road is evidence that it is very old, [Rec. 1286-87.]

Brig. Gen. Richard W. Johnson, U. S. A., [retired] witness for Texas, was stationed in the Red river country in 1859 and heard of the Santa Fe trail but can not locate it. [Rec. 1293.]

Solon A. Loving and Richard Boren, also described this old road in their depositions. (Rec. 1298, 1301-2-3, 1305-6.)

So does J. T. Pollard. [Rec. p. p. 1085-6.]

Thos. F. Roberts, witness for Texas, says there was an old road known as the Natchitoches and Santa Fe trail and it ran up and down Red river. A Comanche Indian guide asked permission of Capt.

Marcy to leave his command and gave as a reason for doing so that there was an old road on Red river that led to Santa Fe, his home. The witness also states that in 1838 a party of Mexican traders came from Santa Fe into the Red river country and they said they came down the road down Red river. [Rec. 1220-1.]

Martin Ragsdale, a witness for Texas, testifies very fully from personal knowledge concerning the massacre of French and Mexican traders by the Indians in 1816. These traders stopped at the house of witness' father, watered their stock and camped there for a day or two. These traders came through that section of country two or three times a year. The trails from Santa Fe to Natchitoches looked ancient when witness first knew them. [Rec, 1332-33, 1338-39-40.]

N. B. Pierce, witness for Texas, graduated from West Point, perfomed military service from 1851 to 1857 in the Indian country north of the Red river and commanded the escort of Capt. Marcy when he explored Texas on the south side of Red river. Witness says they struck an old road in the general direction up Red river which showed by ~~the sar~~ that it was old. [Rec. 1343-45.]

He refers to a road in the locality that came from Natchitoches and Nacogdoches and ran up Red river to Santa Fe. [Rec. 1348-49-51.]

Counsel for the United States has endeavored to confuse matters by claiming that the trails or roads in that section of country were all established by scouting military parties, exploring expeditions,

peace commissions, and Indians and that the great Spanish road never existed along Red river. It is evident, however, from the old maps and the testimony adduced, that an old trail or road which led along the North Fork of Red river still existed and was used by merchants, traders and others for many years, prior to the exploration of the country by exploring parties and military expeditions, and peace commissions. It may be true that when such expeditions passed through the country in later years other roads were located, but this does not change our position that there was an old trail or "Great Spanish Road" from Red river to Santa Fe. It is a significant fact that all of these roads, no matter when they were established, run along, across, or in the vicinity of North Fork of Red river, and that none of them are near or along the Prairie Dog Town river, or South Fork, which shows conclusively that the latter named river was not known to the map-makers and people when such roads were located and traveled; and also establishes the fact that the North Fork was well known as the prolongation of main Red river and was so regarded by every one at that time. We shall not refer in detail to the testimony concerning roads in general inasmuch as they are of no material importance and tend only to confuse and detract from the main fact in issue. For such testimony, however, see Record p. p. 422-26-29-433-445-484-536–544–572-577–582-977–979-1042-1075-1081-1085-1096-1155-1162-1266-1269-1271.

So much for the Spanish occupation of the territory. The evidence as to Texas and the assertion

of her rights to Greer county are, if anything, more explicit.

One of the earliest acts of the Republic of Texas was the assertion of her boundary rights under the treaty of 1819 by virtue of an act of Congress of the Republic of Texas approved December 19, 1836, the first section of which read as follows:

Section 1. "That the civil and political jurisdiction of this Republic be and is hereby declared to extend to the following boundaries, to-wit: Beginning at the mouth of the Sabine river and running west along the Gulf of Mexico three leagues from land to the mouth of the Rio Grande; thence up the principal stream of said river to its sources; thence due north to the 42nd degree of north latitude; thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning." (1 Paschal's Dig. of Laws, Art. 438.)

After her admission as a state, by joint resolution adopted April 29, 1846, Texas asserted her exclusive right to her soil and boundaries in the following words:

Section 1. "That the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of the said Republic; that such exclusive right is now vested in and belongs to the State, excepting such jurisdiction as is vested in the United States by the constitution of the United States and by the general resolution of annexation subject to such regulations and control as the government thereof may deem expedient to adopt; that we recognize no title in the Indian tribes resident within the limits of the state to any portion of the soil thereof,

and that we recognize no right in the government of the United States to make any treaty of limits with the said Indian tribes without the consent of the government of this state." [1 Paschal's Dig. of Laws, Art. 441.]

On November 28th, 1839, the Republic of Texas created the county of Fannin and by the terms of its boundaries included Greer county. [Sayles' Early Laws, Art. 776.]

On March 28th, 1848, the legislature of Texas created the county of Cooke, which embraced Greer county by the terms of its boundary. [See Sayles' Early Laws, 1st Vol. p. 589.]

On December 24th, 1857, the legislature of Texas created Clay county, out of a part of Cooke county, and in defining its boundaries included Greer county. [See Art. 2664, Sayles' Early Laws, giving boundaries of Clay county.]

On February 8th, 1860, the legislature of Texas created the county of Greer as it now stands. [See Art. 2886, Sayles' Early Laws.]

The county of Greer was duly organized on the 10th of July, 1886. [See history of Greer county, 1st Vol. Sayles' Early Laws, bottom page 596.]

On November 28th, 1839, Fannin land district, which included the territory of Greer county, was created by congress of the Republic of Texas. [See laws 4th congress Republic of Texas, 194.]

On February 11, 1850, the limits of Texas were defined by an act of the legislature of the State and included Greer county. [See laws 3rd legislature, p. 207.]

By act of the legislature of Texas, February 14th, 1860, Greer county was attached to Montague county for judicial purposes. [General laws 1860, p. 119, 1 Paschal's Dig., Art. 3971.]

Greer county was made subject to the estray laws and given a county brand by the act of January 11, 1862. [General laws 1862, p. 86, 1 Paschal's Dig., Arts. 3695 et seq.]

November 16th, 1866, Greer county was attached to Montague county for judicial and other purposes. [Laws 11th legislature, p. 94.]

On April 29th, 1874, Greer county was made part of the Clay land district by act of the legislature.

On September 1st, 1879, the limits of Greer county were defined by act of the legislature.

In 1879 Greer county was placed in the 23rd senatorial district.

In 1879 Greer county was placed in the 52nd representative district.

On February 25th. 1879, the legislature of Texas set apart the entire lands situated in Greer county, one-half for the payment of the public debt and one-half for the school fund.

On February 15th, 1881, Greer county was made part of the 35th judicial district. [General laws 1881, p. 8.]

On March 11th, 1881, it was made part of the Clay land district. (General laws 1881, p. 24.)

On April 29th, 1882, it was made part of the 11th congressional district by act of the legislature. [General laws 1882, p. 39.]

On May 3rd, 1882, Greer county was made part of

the 19th senatorial and the 43rd representative districts. [General laws 1882, pp. 10-12.]

On March 27th, 1883, it was made part of the 35th judicial district.

For further reference to many other acts by the State of Texas referring to Greer county, see Record, pages 727 to 730, inclusive.

In addition to this, Texas has donated to Greer county, outside of the limits of Greer county, 17,712 acres (four leagues) for county school purposes. She has erected sixty public school buildings in the county. In 1892 there were 2,250 enrolled scholars in the public schools. In 1892, by the last school apportionment, Texas was distributing annually $11,844 of taxes collected from the people of Texas, among the inhabitants of Greer county for the purpose of public education on the basis of $5.26⅔ per pupil. She had established sixty-six district schools besides school communities, and sometimes they organized two or more institutions in a community for school purposes. Every school district had a school except two, in which they had exhausted their school money in erecting school buildings. [See testimony of Jarrett Todd, County Judge, Rec., pp.10–11 et seq.]

The various expeditions of Texas troops into the territory in controversy is matter of public history. Judge Hugh F. Young gives an account of an expedition, under Col. Snively, which occurred in the spring of 1843. It crossed main Red river and struck the Santa Fe trail between Independence, Missouri, and Santa Fe, New Mexico, at its crossing of the Arkansas river. [R., pp. 935–6–7.]

Col. Geo. B. Erath, who was one of the survivors of San Jacinto, and a distinguished citizen of the Republic of Texas and the State of Texas until his death, and a member of Congress of the old Republic of Texas, testifies as to the investigation by the Congress of every source of information touching the boundaries laid down in the treaty of 1819, by examination of witnesses who were familiar with the territory, he at the time serving on the proper committee in the Congress charged with that duty. [R., 941 et seq.]

This expedition of Col. Snively was captured by the United States troops under the command of Capt. Phillip Saint George Cooke, upon the distinct ground that they were upon United States territory. Capt. Cooke's action was the subject of a court of inquiry convened at Leavenworth, April 2, 1844, and in the opinion of said court it was found that there was nothing in the conduct of Capt. Cooke that was harsh and unbecoming, and that he did not exceed the authority for the protection of the lawful trade of the Santa Fe caravan, derived from the Secretary of War to the commanding general of the army dated March 28th, 1843, which holding of the court was approved by the Secretary of War. [R., pp. 109–10.] On March 3, 1847, however, the Congress of the United States passed an act, among other things, for reimbursing the Republic of Texas and settling its claims according to the principles of justice and equity, for disarming a body of Texan troops under the command of Col. Snively, and appropriating $30,000 therefor. [See 9th U. S. Statutes at Large, p.

168; R., p. 719.] This appropriation by Congress was in accordance with the recommendation of the President of the United States in his message, as contained in full, 1 H. Ex. Doc. 28th Congress, 2nd Sec., p. 12. [R., pp. 137–8.]

In 1860, in accordance with legislative action by the Congress of the United States and by the State of Texas, Governor Sam Houston appointed a commissioner to act jointly with the United States commissioner in running the boundary between the respective jurisdictions in accordance with the treaty of 1819; and among other instructions given by him to the commissioner was that said commissioner should be guided by Melish's map, and insist upon the North Fork as the main Rio Roxo, or Red river, and as the true boundary line as described in the treaty of 1819.

On February 24th, 1879, the Congress of the United States passed an act creating the northern judicial district of Texas, and in said act, in constituting the counties of the State of Texas thereafter to compose the said northern judicial district of Texas, included Greer county as then claimed by the State of Texas. (See 23rd U. S. Stat. at Large, p. 318; R., p. 722.) The boundaries of Greer county, at the time of the passage of this act, and since 1860, were defined by law as follows:

"Beginning at the confluence of Red river and Prairie Dog Town river, passing the mouth of South Fork, and following main or north Red river to its intersection with the 23rd degree west longitude; thence due south across South Fork and to Prairie Dog Town river, and thence following that river to

the place of beginning." (Act Feb'y 8th, 1860, Tex. Legislature, p. 138; 1 Sayles' Civ. Stat., Art. 792.)

This Court takes judicial notice of these facts. It is common knowledge, and the Court has it as any one else has, and especially so of geographical and political divisions of the country.

Best Pr. Ev. (Chamberlin's Ed.), 260–3, notes.

1st Greenl. Ev. (14 Edn.), Sec. 46a, and 479.

Phillips vs. Detroit, 111 U. S.. 606; and see, especially, Ah Kow vs. Nunan, 5th Saw., 552, where the general subject is most forcibly discussed and illustrated.

These facts briefly cited from the record (and there is a vast accumulation of other evidence therein; but to which the attention of the Court is directed), manifest most clearly that Texas has been in the actual possession of the particular territory claimed by the United States in this suit, for a period of more than fifty years, claiming expressly under the treaty of 1819, as Mexico, her predecessor, had before her, and as had been claimed by Spain prior to the independence of Mexico, from the date of the treaty until the termination of her dominion.

The record further abundantly attests, some of the evidence as to which has been cited in this brief, that the United States by solemn acts of her Congress has recognized this possession of Texas and has ripened it into a confirmed right, long anterior to the commencement of these proceedings.

Now, as to the law governing this phase of the controversy.

Vattel, perhaps our best writer on international

law, and certainly the most comprehensive, lays down as a fundamental axiom for the interpretation of treaties, among others, the following principle.

"Whatever tends to change the present state of things is also to be ranked in the class of odious things; for the proprietor cannot be deprived of his right, except so far precisely, as he relinquishes it on his part; and in case of doubt, the presumption is in favor of the possessor. It is less repugnant to equity to withhold from the owner a possession which he has lost through his own neglect, than to strip the just possessor of what lawfully belongs to him. In the interpretation, therefore, we ought rather to hazard the former inconvenience than the latter." Vattel, [Chitty' Ed.] bottom p. p. 365-6.

The same author also lays it down as a principle of international law that

"The party who endeavors to avoid a loss has a better cause to support than he who aims at obtaining an advantage." Same, p. 345-5.

Here we have Texas in possession. The Court is confronted with the "present state of things," and it is asked to do violence to an established principle in the interpretation of treaties by doing what is condemned as an odious thing. A court of equity is asked to take from Texas, not only upon an extremely doubtful claim of right, but in the face of evidence which clearly establishes the wrong, a portion of the latter's territory, chiefly upon a theory arising from a mistaken conception of the facts as they existed at the time of the treaty, and promoted by irresponsible subaltern army officers and land speculators, and in order to accomplish the perpetration of this wrong is forced to ignore the truth and right,

as established by the evidence, in the face of the principle that it is less repugnant to equity to withhold from the owner a possession which he has lost through his own neglect than to strip the just possessor of what lawfully belongs to him. For many years Greer county has had its county officials, has been participating in all the duties and benefits of a county of the State of Texas and paying her portion of the money to carry on the government of said State. Texas, many many years ago, long before the beginning of this generation, had extended her institutions and her laws over the territory in dispute. Texas courts have been held there all the while, quietly and without molestation, and the dearest and best rights of the people there have been determined and adjusted by those courts. People have been there punished by those courts for crimes from the highest to the lowest. Suddenly it is found out by some wandering scientist, from observations on the Dog Star (Prairie Dog Star, perhaps) or the milky way, possibly, that this is all wrong and Greer county is not Greer county. These judicial proceedings are all null and the judges who ordered the disposition of property there in suits, and the hanging and committing to prison of offenders, were without authority, and were and are trespassers and violators of the law themselves, and the social and political organization of Greer county must be torn to pieces and chaos must settle down on that ill-fated county. It appears from the record that a citizen there objected to paying his local taxes and sought an injunction to prevent their collection, be-

cause Greer county was not, but the Court found otherwise, holding he was estopped and Greer county was, and he must pay. So it has been judicially determined Greer county is, in fact and in law, and that stands unreversed and unchallenged. In this connection read the energetic and earnest reasoning of Mr. Justice Brewer in Comanche county vs. Lewis, 133 U. S. 198, and tell us if Comanche county survived the attack then and there made upon it, and still lives, how can Greer county be dismantled and cut away from Texas? If done at all, it must be by some sort of addition to or improvement upon the caesarian operation yet to be discovered or invented.

Here too may be read to much advantage, Phillips vs. Payne, 92, U. S. 130, where an effort was made to avoid payment of taxes because of the alleged unlawful retrocession to Virginia of the county of Alexandria, and the Court held the party is estopped from questioning that, and placed it upon the same ground we find in the case of Comanche county. sup. Further use will be made of this case.

Greer county is fixed and has been all the time since her organization in 1860, a time of piping peace, in a senatorial district, and a legislative district for the legislature of Texas, and she has been constantly so represented there; she has been and is in a United States judicial district by act of congress; she has been and is in a congressional district, and now in the one so ably and faithfully represented by Mr. Cockrell (13th district); and she has had her position all the time in a state judicial district; not

till about seven years ago did the post office department cease to fix post offices in Greer county, Texas, which it had done regularly before then. At that time it, for some reason, changed the description, but it was too late for any purpose touching the rights of Texas to this property. And as late as April 25th, 1877, Mr. Schurz, secretary of the interior, denied authority of the United States over that county.

All this and much more that could be added, if need be, shows that this Greer county, Texas, has been recognized by people, private and public officials, both state and national, and by both state and national authorities, legislative, executive and judicial. Not more firmly fixed in their respective statehoods is Cook county in Illinois nor Bourbon county in Kentucky, nor Bucks county in Pennsylvania.

Nations are prescribed and estopped as individuals, so are we told by this Court in Phillips vs. Payne, sup. In this discussion we stand alone upon acts open and undisguised, and say nothing upon propositions to settle or to compromise, after it was thought by some one the line should be away below where it is, as all such efforts are for peace and quiet and the law commends them and does not draw any admission from them.

The doctrine of estoppel does not apply in precisely the same way that it does to an individual, as said by Henderson, J., in Taylor vs. Shuffold:

"I know of no case where the sovereign power has been estopped; the cases are all the other way and policy and justice requlre that they should be so.

This sovereign or sovereign power is a trustee for the people; it acts by its agents; the people should not be bound by any statements of facts made by its agents. For their benefit the truth may be shown notwithstanding any former statement to the contrary."

Hawkes, L. & E., 4 N. C., 132.
Fannin county vs. Riddle, 51 Texas, 360.
Candler vs. Lunsford, 4 Dev. & Bat. (Law) N. C.
Farris vs. Coon, 40 Cal., 50.
Johnson vs. U. S., 5th Mason C. C. R., 425.
Saunders vs. Hart, 57 Texas, 10.

As said by the Supreme court of Texas in the Day Co. v. The State, "the state cannot be estopped by the acts of any of its officers done in the exercise of a power not conferred upon them, any more than it can be bound by contracts made by its officers which they were not empowered to make." (68 Texas, 553.)

See also Carr vs. U. S., 98 U. S. Rep., 433.

An apparent exception to this doctrine that the State cannot be bound by estoppel arises in those cases in which the acts sought to be made binding were done in her sovereign capacity by legislative enactment or resolution.

Alexander vs. State, 56 Ga., 466.
Enfield vs. Permit, 5 N. H., 285.
Commonwealth vs. Heirs of Anfre and Belton, 3 Pick, 224.

This is the established principle as to the law of estoppel with reference to government, and whenever it is sought to conclude government, either state

or national by an estoppel, the party claiming the right must be able to point to some legislative act which speaks for the government in its sovereign capacity, or to some act done in pursuance to legislative authority. The record may be searched in vain for any legislative or governmental act upon the part of Texas tending in the slightest degree to indicate any intention on the part of Texas to abandon her rights as set up in this case. From the earliest day to the present she has constantly in season and out of season, asserted those rights, and in every way conceivable. Quotations from the reports of her subaltern officers to her executive, or from arguments derived from her repressntatives upon the joint commission to settle the boundary in dispute, are equally impotent. Her governmental acts speak for themselves, and stand out in prominence from the first page of this record to its last page.

Not so, however, with the complainant, the United States. Here we find two real acts of estoppel, substantial, governmental, sovereign.

1. The re-imbursement of Texas for the disarmament of Snively's command was recommended by the president to Congress, and Congress in pursuance of such recommendation, promptly provided compensation, *sup.* If Snively's command was not upon United States territory at the time of its disarmament by Captain Cooke, the Texans were there wrongfully and ought to have been disarmed, and their arms confiscated. There could be no claim for indemnity on the part of Texas for a wrongful act such as this. If she invaded the territory of a

neigboring Republic in 1843 her troops should have been captured and their arms and supplies should have been confiscated; because for all intents and purposes they were acting as public enemies and by the law of nations were entitled to no grace. Yet, as shown above, in 1847, the government of the United States made public reparation for the wrong done, practically confessing the wrong, and in effect declaring by the legislation, that the Texas troops were rightfully upon Texas territory at the time they were captured and their arms seized by Captain Cooke. This territory comprises the territory of Greer county, now in dispute, and it is too late now for the government to contend for a different finding.

2. A governmental act of more potent significance is in the legislation by Congress of 1879 creating the Northern Judicial District of Texas. The force and effect of this legislation is attempted to be parried by complainant in this cause by the insertion of long extracts from the reports of house committees and statements by chairmen of house committees that this legislation was inadvertent and had and done in ignorance by the members of the Congress and Senators as to the true status of the territory embraced within such legislation. The counsel for the government seem to misapprehend or to defiantly disregard the force and potency of his own suggestion. Can the government of the United States, the greatest government on earth, and growing stronger and greater every day, afford, for a small advantage in a law suit, to disregard, defy and set at naught that

great principle of government recognized among all civilized nations and thoroughly established in the decisions of this Court that an act of sovereign legislation can not be impugned by questioning the motives of the law-makers? Is it permissible, even in a suit between governments, to probe into the hearts and minds of the individuals composing the law-making department of the government, and to embody in a decree of a court whose every act must be governed by the enactments of law-making power, that these law-makers were dolts and idiots? If such is the case, all the solemnities of legislation are vain, and rendered naught. But such is not the law, and will never be pronounced the law by this Court. This Court, and every other court, must take the law as it comes from the law-making department of the government. It can not go behind the returns. It can not question the motives of legislators, nor their capacity or incapacity, their learning or their ignorance, their integrity or their dishonesty. What is writ is writ. And when the Congress of the United States, by its solemn enactment, conceded to Texas that she was the rightful owner of Greer county and embodied its territory in a judicial district of Texas, provided a judge, and set up its judicial machinery operated within said county in the State of Texas, it stops further investigation and closes the mouths of counsel and courts. Authorities are not necessary to be cited in support of this proposition, because it is elementary and fundamental.

Of equal significance is the fact that, notwithstanding these reports of committees, and ex-cathedra

utterances of chairmen of committees, this statute of Congress so disposing of Greer county, Texas, as a part of the territory of Texas, has been upon the statute book for fifteen years unrepealed, unqualified, and unaffected. can this Court disregard such legislation? Can this Court, with all its powers, afford to say, and especially upon the faint intimations of the record, that Congress did wrong, either from ignorance or any other motive? Not so. The record is made up, and this Court and every State in the Union and every citizen of every State, and the United States itself, must abide by the record as made. Greer county is a part of Texas, so conceded by the government of the United States, which stands in law estopped by such governmental act.

But we are told by counsel for complainant that Texas is estopped by the boundary settlement of 1850 and the purchase by the United States government of the Santa Fe territory heretofore claimed by Texas. Let us examine into this briefly.

On September 9, 1850, the Congress of the United States, with the approval of the President, made the following proposition to the State of Texas with reference to her northern and western boundary:

"1. The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on

said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte; and thence with the channel of said river to the Gulf of Mexico.

2. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement * * *."

(See 9th U. S. Stat. at Large, p. 446.)

On November 25, 1850, Texas, by an act of her legislature, accepted said proposition as to boundary, incorporating in such accptance propositions first and second of the United States, sup. (R. 725–726.)

As we understand counsel for complainant it is now contended that by virtue of the terms of this proposition on the part of the United States and acceptance by Texas, the territory embraced within the limits of Greer county was ceded to the United States. How this could result is not made apparent from the argument in complainant's brief, as Greer county was not situated on the northern or western boundary of Texas, and this proposition on the part of the government was manifestly simply for the purpose of settling the northern and western boundaries of Texas. The maps of Texas of the present day demonstrate what was meant by the agreement. The discovery that Texas is concluded by such agreement, is amusing rather than otherwise in view of the terms of the act of Congress of June 5, 1858 (11 U. S. Stat. at Large, p. 310), wherein the President was authorized and empowered to appoint a suitable person or persons in conjunction with such person or persons as might be appointed by and on behalf of the State of Texas for the same purpose to run and

mark the boundary lines between the territory of the United States and the State of Texas; beginning at the point where the 100th degree of longitude west from Greenwich crosses Red river, and running thence north to the point where said 100th degree of longitude intersects the parallel of 36 degrees and thirty minutes north latitude; and thence west with the said parallel of 36 degrees and 30 minutes north latitude to the point where it intersects the 103d degree of longitude west from Greenwich; and thence south with the said 103rd degree of longitude to the 32nd parallel of north latitude; and thence west with the said 32nd degree of north latitude to the Rio Grande. (R. pp. 721-2.)

Evidently Congress, from this act, did not look at the settlement of 1850 through the same spectacles as does counsel for complainant in this cause, for in the act quoted, it provided for running the boundary line where the 100th degree of longitude intersected Red river, and thence north to where it should intersect the parallel of 36 degrees and 30 minutes north latitude. These points not being embraced in the settlement of 1850.

Again, in the act of January 31, 1885, providing for the appointment of a commission to ascertain the boundary between the United States and Texas, it is expressly recited that a controversy exists between the United States and Texas as to the point where the 100th degree of longitude crosses Red river as described in the treaty of 1819, and that the point of said crossing had never been ascertained and fixed by any authority competent to bind the United

States and Texas, and it was desirable that a settlement of the controversy should be had to the end that the question of boundary in dispute because of a difference of opinion as to said crossing may also be settled, therefore, etc." See U. S. Stat. at Large, 1884-5, p. 296. (R. 723.)

This contention on the part of counsel for complainant is also directly contrary to the act of Congress last qnoted, and which is incorporated in the bill of complaint as a basis for the claim of the United States. So there is a clear governmental recognition by the United States government of the fact that up to 1885 the line of 100th meridian of longitude from where it crosses Red river to 36 degrees and 30 minutes north latitude had never been definitely ascertained so as to bind either government. This, of itself, disposes of the question of estoppel so far as Texas is concerned.

Again, by the terms of the treaty between the United States and the Republic of Texas on April 25, 1838, which was ratified on October 12th and 13th, 1838, it was expressly agreed that until the line was marked out as provided for in the foregoing article, each of the contracting parties should continue to exercise jurisdiction in all territory over which its jurisdiction has heretofore been exercised, and that the remaining portion of the said boundary line should be run and marked at such time thereafter as may suit the convenience of both contracting parties, until which time each of the said parties shall exercise, without the interference of the other within the territory of which the boundary shall not have been so

marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised. (R. pp. 28–29.)

The object and purpose of the settlement of 1850, was the purchase of the Santa Fe territory by the Unitcd States and its establishment into a separate territory. In order to accomplish this it was unnecessary to run the 100th meridian of longitude from Red river to 36 degrees and 30 minutes north latitude, and no provision was made for the establishment of that portion of the boundary; nor was such establishment contemplated by the parties to this contract. Texas claimed and owned to the 42nd parallel of north latitude under the terms of the treaty of 1819, including New Mexico, portions of Colorado, Kansas, and the Indian Territory north. Grave difficulties were about to ensue between the United States government and the State of Texas as to this claim, in order to settle which the govermment purchased the territory of Texas and paid therefor ten millions of dollars in United States stock. The 100th meridian of longitude north from Red river has never been run, under the authority of the United States and of Texas. In 1860 the United States commissioner run the line from the Rio Grande to the 103rd meridian of longitude, thence north to 36 degrees and 30 minutes, and thence east to the 100th meridian of longitude. He thereupon adopted the 100th meridian of longitude as established by Jones and Brown by their surveys in 1857. Upon his refusal to run the line to Red river, or North Fork, as he styled it, the Texas commis-

sioner refused to participate with him and withdrew from the work, leaving the whole question as to what was Red river unsettled and undetermined. And this was the last attempt for joint action on the part of the respective governments until 1886 which last attempt resulted in failure as all former attempts had done.

At the time of the contract of 1850, known as "the Santa Fe purchase," the 100th meridian of longitude rested where Melish had placed it, more than a degree east of the forks of the two rivers. It was after the Santa Fe purchase, to-wit, in 1852, the 100th meridian of longitude was established by Marcy and McClellan six miles east of the junction of the two river, and Marcy delineated that line on his map, where it may be found to-day, as the dividing line between the Choctaw Territory and Texas, which line is considerably east of North Fork and embraced territory which Texas does not claim. The contention of Texas from 1836 until this day has been that she owns all the territory south of Red river and to the point where the 100th meridian of longitude intersected said Red river of the treaty, North Fork. The contention of the United States is that Prairie Dog Town river is Red river and Texas only owns to where the 100th meridian intersects Prairie Dog Town river. The 100th meridian having been established at the time of the settlement between Texas and the United States at points east of the junction of the two rivers and having been moved since and established by one party alone to the contract in 1857, through private land survey-

ors and contractors, Texas cannot be concluded, even in the absence of legislation hereinbefore recited on the part of the United States government by any such state of facts. We therefore dismiss the contention as unworthy of any further consideration.

As said before, Texas, and those under whom she claims, has been in possession and enjoyment of this territory for nearly a century, claiming under the treaty of 1819.

Not until 1852 was it even whispered that the two high contracting powers, making that treaty were ignorant of their business and knew not what they did, and that was a low gentle whisper. It has been determined by courts and other authorities, that thirty-three years is about the average of human life. Think of it! A man in Greer county must wait an average life time before he knows whether he belongs to Spain, or Mexico, or Texas, or to the United States, or to the Indian Nation. The thought is enough to make civilization turn pale, and to cause Greer county people to lament that they were ever born.

But after this dream came to disturb and trouble, about thirty-eight years come and go before any active substantial steps as between the parties, are taken to see, in truth, how this is. This lapse of time brings us to about one year over the three score years and ten allotted by scripture to man here on earth. Whatever conflicts, real, or supposed, there may be, between science and scripture, it is believed that in this matter of time of man here, they are agreed, as science, it is stated, says the machinery,

as a rule, goes to waste and falls to pieces by that time. It is an apalling spectacle, truly, that these people should be born and grow up and live there the time allowed, and go down to their graves without allegiance to any power, prince, or potentate known to them or to their heirs.

Yet more, under this new light, so suddenly flashed out upon us, if Mr. Cockrell, representing the congressional district in which Greer county is, should live there, he would be unseated, as he could not, living there, be an inhabitant of Texas; so, too, if one or both of her able senators should live there, they also could not stay in the Senate, but would have to drop their robes and go forth, as they are not inhabitants of the State!

The job is a large, a herculean one, and especially for a court to undertake, as we are informed by this Court (Phillips vs. Payne, sup), in a list of authorities nearly as long as the multiplication table, that such questions are for the political departments to settle, and the courts follow their action. In this case (Phillips vs. Payne) the move to unsettle the retrocession was made twenty odd years after the act of retrocession. Here we have thirty-three years, before even a hint was made as to any trouble or difficulty, and twice more than that before any steps were had to look into the question formally; and during all this while, as we have seen, all sorts of acts, open, direct and plain, by all sorts of people, and by all sorts of political departments, State and national, in recognition of Greer county, Texas, done and performed.

Some of the Southern States, apprehensive of dreadful consequences from the acts of reconstruction passed after the late war between the States, sought to enjoin the enforcing the same, but they were denied this right upon the ground that the political departments had found the facts to exist, and the courts must adopt and follow that. (Mississippi vs. Johnson, 4 Wall., 475.) This was only a year or so after the passage of the act; just as early as the suit or suits could be brought. The political departments recognized the transferring of Berkley and Jefferson counties from Virginia to West Virginia, and in a few short years, when the old mother piteously begged the Court to restore these two children to her, she was answered it could not be done, as others had recognized the act, and this Court must follow. (11 Wall., 39.)

If all these cases be law, and it seems there is none to dispute, what can be said as to this absolute, unqualified recognition of Greer county, Texas, through this long course of years? The proposition is decided before it reaches here, and this Court must follow the decision, as it has done so well and so kindly before many, many times.

But quite recently Mr. Justice Field, in Virginia vs. Tennessee, 148 U. S., 503, in a finished and exhaustive opinion reviews all these questions—acquiescence, positive recognition, etc., etc., and considers the cases above cited, and many others, and finally announces this doctrine:

"A boundary line between States or provinces, which bas been run out, located and marked upon the

earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive."

Enough said, and it is all we ask. It only formulates and puts in exact shape what the case in 40 Fed. R., sup., and the others we cite announce in different language, and especially what the same learned Justice said in words unmistakable in Indiana vs. Kentucky, 136 U. S., 479; and in Wharton vs. Wise, 153 U. S., 155; reaffirmed the identical doctrine as to States ratifying and acquiescing in contracts or compacts entered into by them.

We have here the recognition by not only the parties, but of all persons and governments concerned for "a long course of years"—yes, a very long course of years—"running back almost into the dim antechambers of the past." But quitting for the time the plain letter of the law upon this subject, it is sure Texas cannot be disturbed in her occupation of this land upon any doubtful or speculative state of facts. She is in possession and has been for a great while, as we have seen, and her possession is presumed in all things to be legal. Her right is attacked by the United States, and the burden is upon the United States to prove her case and defeat Texas by positive, clear, an irrefragable proof; and this she does not furnish. The record shows fully how doubtful it is yet where this meridian is. No one can say from the proof with any degree of assurance where it is:—it is not shown with "substantial proof under substantial variety." And standing as this proceeding does; as an action to recover real estate

in ejectment, the plaintiff must recover upon the strength of her title and not upon the weakness of that of defendant.

In fact, taking the testimony together as a whole, and considering the character of the witnesses and their opportunities and advantages to know and their capacity to tell, we insist the preponderance of testimony decidedly favors the true line as Texas contends for. If the preponderance is to control, we have it. But the plaintiff has the burden, and it must be established by clear and convincing testimony. If this rule, so well known according to the authorities, is not to be observed here, the bill could well be amended and take in all Texas, with San Jacinto, Goliad, the Alamo and all the rest included.

We submit, in conclusion, that the case is with Texas upon all the points at issue:

1. Because the boundary was fixed according to the 100th meridian of longitude, as laid down by Melish, which gives Greer county to Texas.

2. Because no such matter of mistake of the contracting powers is either alleged or proved, to entitle complainant to relief.

3. That the Rio Roxo of Natchitoches, named in the treaty, is the North Fork of Red river to its sources, as shown by the testimony and recognized by all parties.

4. That what complainant calls North Fork, corresponds approximately with natural objects and boundaries, as delineated with Melish on his map of 1818.

5. That Texas has been in the possession of the

territory of Greer county ever since her existence, claiming, using, and enjoying the same, openly and notoriously for more than fifty years.

6. That the United is estopped and concluded by governmetal acts which conceded the right of Texas to the territory in dispute.

In the behalf of the State of Texas, therefore, and in accordance with the articles of annexation of 1845 under the warranty of the United States, which guarantee to Texas her boundaries as they then existed, and the retention by her of all her lands and territory, we ask of this Court that a decree be entered dismissing complainant's bill, and that Texas be left in the peaceful and quiet enjoyment of that which has been her own from time immemorial.

C. A. CULBERSON,
GEORGE CLARK,
A. H. GARLAND,
H. J. MAY,
Solicitors for the State of Texas.

Office Supreme Court, U. S.
FILED.
FEB 27 1895
JAMES H. McKENNEY,
CLERK.

THE GREER COUNTY CASE.

IN

The Supreme Court of the United States

OCTOBER TERM, 1894.

THE UNITED STATES OF AMERICA,
Complainants,

v.

THE STATE OF TEXAS,
Defendant.

ARGUMENT FOR DEFENDANT.

CHARLES A. CULBERSON,
GEORGE R. FREEMAN,
M. M. CRANE,
Of Counsel for Defendant.

IN

The Supreme Court of the United States.

No. 4, Original.

THE UNITED STATES OF AMERICA, Complainants,

v.

THE STATE OF TEXAS, Defendant.

ARGUMENT FOR DEFENDANT.

Statement of the Case.

The general object of this action is well known to the court, and further statement of it is deemed unnecessary at this place. Stripped of a mass of confusing and irrelevant testimony and data, upon which much argument is based, the real controversy is of a three-fold character, namely: (1) Whether the solemn treaty compact between the United States and Spain of February 22, 1819, Texas succeeding to the rights of Spain, shall be observed; (2) If this compact shall be disregarded, which of the two streams, North Fork or South Fork, is the true Red River, considered historically and scientifically; and (3) Whether the United States are not estopped, by legislative recognition of the claim of Texas, and her dominion for half a century, from disputing the boundary line and claiming the territory. The first and second of these propositions only will be considered in this argument.

I.

The map of Melish, improved to the first of January, 1818, made part of the treaty, conclusively establishes the claim of Texas to the territory in controversy, and known as Greer county.

(1) So much of the treaty that is pertinent to this inquiry is contained in article 3, and is as follows:

"The boundary line between the two countries west of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the River Sabine, in the sea, continuing north, along the western bank of that river, to the 32nd degree of latitude, thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red River, and running thence, by a line due north, to the River Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818."

The boundary line from the mouth of the Sabine River to the point where the line strikes the Rio Roxo of Natchitoches or Red River is not disputed, and that on the north and west of the State was settled by the act of September 9, 1850. This act of 1850 has no reference to the boundary line from the point where it intersects Red River, thence up that river to the 100th meridian and northward, or to the disputed territory. This is plain from the act itself, and it is expressly alleged in the bill (Record, p. 31), referring to this act: "*No reference was made in said contract or agreement, nor was there by intendment between the parties thereto any settlement of the question in dispute as to the ownership of the territory between the North Fork of Red River and Main Red River, as bounded on the west by the one hundredth meridian aforesaid.*" The case therefore turns upon that portion of the treaty providing, "then following the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red River and running thence by a line due north to the River Arkansas," and "*the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818.*"

In his brief, counsel for the United States declares (page 10), "if on the state of facts thus presented the meridian 'as laid down on Melish's map' shall be determined to be the western boundary of the United States bordering on Texas, this controversy would end right here; Greer county would clearly be a part of the State of Texas; and the defendant be remitted to her remedy for the recovery of or compensation for the residue of the vast domain which, under the pleadings in this cause, she claims to be rightfully hers." To put the question differently, it is declared in the brief that unless the act of 1850 shall be held to bind Texas to the actual 100th meridian, and not that of the Melish map, Greer county belongs to her, and it is averred in the complaint that that act had reference neither to the territory included in that county nor to the question of settlement of the ownership thereof. If effect is to be given to the pleadings and the deliberate admissions of record, further argument is useless.

But the case need not be rested upon the averments of the complaint. Accepting the admission and argument of complainants' counsel, that unless the act of 1850 operates to settle the eastern boundary line of the State against her claim, the territory rightfully belongs to Texas, other facts make it indisputable that the act can be given no such effect. In the first place, when this act was passed, the actual intersection of the 100th meridian with Red River had not been determined, and the meridian referred to in the act necessarily and logically was that shown on the map of Melish made part of the treaty. The title of the act shows that it is confined to the northern and western boundaries. By the first section of the act Texas agreed that "her boundary *on the north*" should commence at the point of intersection of the 100th meridian with the parallel 36°30′, and by the second section ceded to the United States "all her claim to territory *exterior*" to this line, thus clearly and undoubtedly ceding only territory *north* of this line. This is also shown by the controversy which led to the passage of this act, for it is well known that this had no reference to the eastern boundary line of the State. At that time the United States had not asserted any claim to Greer county, and did not do so until years afterwards. The eastern boundary line of the State is re-

garded by the United States as that laid down by Melish on his map of 1818; the act of 1850 has been so construed by Congress. By the act of the Legislature of Texas of May 2, 1882, the United States were invited to appoint commissioners to mark the line thus defined, and the Congress accepted said invitation by the act of January 31, 1885, reciting the terms of the treaty of 1819, and directing the commissioners to "mark the point where the 100th meridian of longitude crosses Red River *in accordance with the terms of the treaty aforesaid.*" In view of these solemn declarations by Congress, together with the pleadings and other considerations mentioned, it is manifest that the 100th meridian of longitude named in the act of 1850 is that laid down by Melish. But if the intersection of the 100th meridian of longitude with the parallel 36°30′ north latitude, constituting the beginning of the north boundary line of Texas under the act of 1850, shall be held to mean the actual and not the Melish intersection, it does not follow that the actual and not the Melish 100th meridian constitutes the eastern boundary line of the State. The reasons already stated abundantly support this proposition. Before this court can reach the conclusion contended for by complainants, it must set at naught the pleadings in the cause, the repeated declarations of the sovereign power of the United States, and the obvious meaning of the act of purchase. Nor is the situation altered by the fact that this construction will leave for future determination the ownership of a portion of the northeastern territory. That has occurred before (Cook v. U. S., 138 U. S., 167), and should not be used as a pretext to disturb the integrity of our territory. The small consideration of ten million dollars paid under the act of 1850 in itself refutes such a contention, and the United States, now grown imperial in every national aspect, should limit rather than enlarge the terms of contracts with members of the Union.

(2) Counsel for the United States does not appear to contest the proposition that the map of Melish constitutes part of the treaty, and that its representation of degrees of latitude and longitude is controlling unless affected by the act of 1850. The rule is thoroughly settled.

McIver's Lessee v. Walker, 9 Cranch, 173;

McIver's Lessee v. Walker, 4 Wheat, 444;
Noonan v. Lee, 2 Black, 499;
Davis v. Rainesford, 17 Mass., 211;
Jenkins v. Trager, 40 Fed. Rep., 728, 729;
Koeningham v. Miles, 67 Texas, 113;
Cragin v. Powell, 128 U. S., 691.
Jeffers v. Land Co., 134 U. S., 178.

If there were otherwise doubt of the matter, the fact that the treaty expressly provides for determining the *actual* source of the Arkansas river, regardless of the map, establishes beyond question that the purpose was to leave all else to the delineation of the map. While this rule is practically admitted, it seems to be insisted by counsel that the Melish delineation of upper Red River is inaccurate, that the north and south forks of that river as now known are not represented upon that map, and that the United States had no other knowledge of the country other than that afforded by the Melish map. Recalling the admission heretofore referred to, that according to that map Greer county is in Texas, it is not material, if true, that the forks are not represented, or that the map is not accurate, or that the United States were without other information, and a decree should be entered for the defendant regardless of these matters. For reasons to be stated, it is certain, however, that both of the forks of the river are laid down on the Melish map of 1818, that their existence was fully known to the United States and Spain at the date of the treaty, and that the map is surprisingly accurate.

(3) Before discussing these propositions, it should be noted that there is strong testimony to the effect that the South Fork, or Prairie Dog Town River, is not laid down on the Melish map, that the treaty was entered into without reference to it, and consequently the North Fork is the river of the treaty. It may be mentioned, for instance, that Charles W. Pressler, at present and for 38 years engaged as chief and assistant draughtsman in the General Land Office of Texas, and the most experienced and competent map maker in the State, testified on this point as follows:

"25 Q. Have you ever seen a copy of the map of John Me-

lish, improved to January first, 1818, now on file in the Department of State at Washington?

"A. No, sir; I have not.

"26 Q. Have you in your possession a certified tracing from that map?

"A. Yes, sir; of part of it.

"27 Q. Have you compared the tracing to which you refer with modern maps?

"A. Yes, sir.

"28 Q. Have you the tracing in your possession here in this room?

"A. Yes, sir.

"29 Q. Please examine the tracing of the Melish map in your possession, under the seal of the Secretary of State of the United States, and answer if Red River is not made to fork west of the 100th meridian?

"A. Well, there is a fork just west of the 100th meridian.

"30 Q. According to this tracing you have under the seal of the Secretary of State of the United States, how far east of the fork of Red River does the 100th meridian intersect Red River?

"A. It is about 70 miles.

"31 Q. As compared with modern maps, what streams, as at present known, do the two forks of Red River, as shown on the tracing to which you refer just west of the 101st meridian, most nearly compare?

"A. Well, I don't know of any forks that could be compared with that fork.

"32 Q. Please examine the tracing of the Melish map referred to in connection with maps of the present time between the 100th and the 102nd meridians where the same intersects Red River, and answer whether the North or South forks upon Melish's map more nearly corresponds with what is known as the North Fork of Red River, giving your reasons fully.

"A. Well, the 101st degree of longitude does not intersect at all, it is the 102nd, while the upper fork agrees in position with the North Fork, and the other seems to be the main river, according to this map.

"33 Q. With reference to the Wichita Mountains, as laid down upon the Melish map of 1818 and modern maps, which of those two rivers on the Melish map most nearly corresponds with the North Fork of Red River as now known?

"A. Well, the tracing before me does not show the mountains.

"34 Q. Have you ever seen a copy of the Melish map showing the mountains?

"A. No, sir.

"35 Q. Since the foregoing interrogatories were propounded, have you seen any copy or photographic copy of any map purporting to have been made by John Melish?

"A. Yes, sir.

"36 Q. Which were they?

"A. It was a photographic copy of Melish's map of 1818.

"37 Q. Does that purport to be a photograph made by Handy, photographer at Washington?

"A. Yes, sir.

"38 Q. Have you seen one of Melish's maps of 1823?

"A. Yes, sir; I have.

"39 Q. With reference to the Melish map of 1818, which of the forks of Red River, just west of the 100th meridian, more nearly corresponds with the North Fork of the Pressler and Langermann map of 1879?

"A. Well, I believe that the North Fork agrees best with the Rio Roxo, as laid down on Melish's map of 1818.

"40 Q. Do you mean the western prong of the Rio Roxo, just west of the 100th meridian, as laid down on Melish's map?

"A. I mean the one designated on the map as the main stream—the western one.

"41 Q. Upon what do you base this opinion?

"A. Well, if you draw a line on Melish's map from the intersection of the 100th meridian to the head of the Rio Roxo, the line runs about north 54° west. If you draw the same line on Pressler's map from the intersection of the 100th meridian to the head of the North Fork, it runs about the same course—north 54° west; and if this line be continued, it strikes about the same point where Melish represents the head of the Rio Roxo.

"42 Q. Suppose you adopt the same course and make the same comparison with reference to the Prairie Dog Town River?

"A. Well, if you draw a line from the intersection of the 100th meridian with Prairie Dog Town River, and draw a straight line to its head, the course will be about north 82° west.

"43 Q. If this line be prolonged, how would it compare with the point represented by Melish as being the source of the Rio Roxo?

"A. Well, it would be far below—south of Santa Fe.

"44 Q. In your judgment, is the South Fork laid down on Melish's map?

"A. No, sir." (Record, pp. 993, 994.)

General R. B. Marcy, the distinguished soldier and explorer, testified as follows:

"I have this morning, for the first time, seen a copy of that

lish, improved to January first, 1818, now on file in the Department of State at Washington?

"A. No, sir; I have not.

"26 Q. Have you in your possession a certified tracing from that map?

"A. Yes, sir; of part of it.

"27 Q. Have you compared the tracing to which you refer with modern maps?

"A. Yes, sir.

"28 Q. Have you the tracing in your possession here in this room?

"A. Yes, sir.

"29 Q. Please examine the tracing of the Melish map in your possession, under the seal of the Secretary of State of the United States, and answer if Red River is not made to fork west of the 100th meridian?

"A. Well, there is a fork just west of the 100th meridian.

"30 Q. According to this tracing you have under the seal of the Secretary of State of the United States, how far east of the fork of Red River does the 100th meridian intersect Red River?

"A. It is about 70 miles.

"31 Q. As compared with modern maps, what streams, as at present known, do the two forks of Red River, as shown on the tracing to which you refer just west of the 101st meridian, most nearly compare?

"A. Well, I don't know of any forks that could be compared with that fork.

"32 Q. Please examine the tracing of the Melish map referred to in connection with maps of the present time between the 100th and the 102nd meridians where the same intersects Red River, and answer whether the North or South forks upon Melish's map more nearly corresponds with what is known as the North Fork of Red River, giving your reasons fully.

"A. Well, the 101st degree of longitude does not intersect at all, it is the 102nd, while the upper fork agrees in position with the North Fork, and the other seems to be the main river, according to this map.

"33 Q. With reference to the Wichita Mountains, as laid down upon the Melish map of 1818 and modern maps, which of those two rivers on the Melish map most nearly corresponds with the North Fork of Red River as now known?

"A. Well, the tracing before me does not show the mountains.

"34 Q. Have you ever seen a copy of the Melish map showing the mountains?

"A. No, sir.

"35 Q. Since the foregoing interrogatories were propounded, have you seen any copy or photographic copy of any map purporting to have been made by John Melish?

"A. Yes, sir.

"36 Q. Which were they?

"A. It was a photographic copy of Melish's map of 1818.

"37 Q. Does that purport to be a photograph made by Handy, photographer at Washington?

"A. Yes, sir.

"38 Q. Have you seen one of Melish's maps of 1823?

"A. Yes, sir; I have.

"39 Q. With reference to the Melish map of 1818, which of the forks of Red River, just west of the 100th meridian, more nearly corresponds with the North Fork of the Pressler and Langermann map of 1879?

"A. Well, I believe that the North Fork agrees best with the Rio Roxo, as laid down on Melish's map of 1818.

"40 Q. Do you mean the western prong of the Rio Roxo, just west of the 100th meridian, as laid down on Melish's map?

"A. I mean the one designated on the map as the main stream—the western one.

"41 Q. Upon what do you base this opinion?

"A. Well, if you draw a line on Melish's map from the intersection of the 100th meridian to the head of the Rio Roxo, the line runs about north 54° west. If you draw the same line on Pressler's map from the intersection of the 100th meridian to the head of the North Fork, it runs about the same course—north 54° west; and if this line be continued, it strikes about the same point where Melish represents the head of the Rio Roxo.

"42 Q. Suppose you adopt the same course and make the same comparison with reference to the Prairie Dog Town River?

"A. Well, if you draw a line from the intersection of the 100th meridian with Prairie Dog Town River, and draw a straight line to its head, the course will be about north 82° west.

"43 Q. If this line be prolonged, how would it compare with the point represented by Melish as being the source of the Rio Roxo?

"A. Well, it would be far below—south of Santa Fe.

"44 Q. In your judgment, is the South Fork laid down on Melish's map?

"A. No, sir." (Record, pp. 993, 994.)

General R. B. Marcy, the distinguished soldier and explorer, testified as follows:

"I have this morning, for the first time, seen a copy of that

portion of Melish's map of the United States embracing the part of the Red River country which this commission has under consideration at this time, which is authenticated by the signature of the Secretary of State of the United States.

"Upon this map only one large fork of Red River is delineated, with one or more northerly small affluent, which is not named, but may have been intended for the Washita River or Cache Creek.

"But none of the important southern tributaries, such as the 'Big Wichita,' Pease River, and the Prairie Dog Town River, are delineated thereon, unless the stream marked as the 'Rio-san-saba' is designed for the Prairie Dog Town branch; and as the real 'Rio-san-saba' of Texas is 500 miles, or thereabouts, distant from this locality, it does not seem improbable that if the maker of the map had any vague conception of the existence of such a stream as the Prairie Dog Town River, he might have intended this as such. It certainly was, as far as the section of the map shows it, nearly in the direction of that branch of Red River, and is put down as rising near the eastern border of the Staked Plains, but the small section of the map does not show where it runs.

"I regarded the Prairie Dog Town branch as the main Red River, for the reason that its bed was much wider than that of the North Fork, although the water only covered a small portion of its bed, and as the sandy earth absorbed a good deal of water after it debouched from the cañon through which it flows, it may not contribute any more water to the lower river than the North Fork.

"The Prairie Dog Town branch and the North Fork of Red River, from their confluence to their sources, are of about equal length—the former being about 180 miles and the latter 177 miles in length.

"For reasons which I will presently state I have been unable to resist the force of my own convictions, that the branch of Red River that I called the North Fork of that stream was what is designated upon Melish's map as Rio Rojo.

"I doubt if the Prairie Dog Town River was ever known to civilized men prior to my exploration in 1852; and if it was ever mapped before then, I am not aware of it.

"The character of the country through which this stream flows is such that travelers would not have likely passed over it when there was a much more favorable route north of the North Fork.

"The waters in the Prairie Dog Town branch, from its confluence with the North Fork to within two miles of its head spring (about 100 miles), I found so bitter and unpalatable that many

of the men became sick from drinking it. But one pool of fresh water was found throughout the entire distance, and the Indians told me they never went up this stream with their families if it could be avoided, for the reason that the nauseous water frequently proved fatal to their children. Hence, it is not surprising that but little, if anything, should have been known of this repulsive region before my exploration in 1852. And this probably accounts for the entire absence of most of its southern branches upon Melish's map.

"It is very certain that the 'Prairie Dog Town River' was never delineated upon any of our maps, or designated by any Spanish, French, or English name, as were the most of the other streams in that country, and it was only known to the Indians, and possibly to some Mexican traders as 'Ke-che-ah-que-ho-no,' a Comanche appellation, the signification of which the Delawares informed me was 'Prairie Dog Town River.' I was informed in New Mexico that the Mexicans were the only semi-civilized people who, for many years, ventured into the Comanche and Kiowa country, and they only went there for traffic, transporting their merchandise in ox-carts from Santa Fe, along the identical track which I followed in escorting California emigrants from Arkansas in 1849, where, as I said before, we found the great part of the way a perfectly smooth prairie surface upon a high divide, admirably adapted to wagon travel, with abundance of good wood, water, and grass, for camping purposes, and upon this route deep Mexican cart tracks, made when the ground was soft many years previous, were often observed, showing that the route had been travelled for a long time, but no such track, roads, or trails were seen within the valley of Prairie Dog Town River, and no evidences of Indians having frequented that section were noticed there. As before stated, owing to the absence of good water, the sandy character of the soil along this river, and the formidable obstruction presented by the elevated and wide spur of the Staked Plains, and the extensive belt of gypsum crossing this route, the Mexicans would never have attempted to traverse it with their carts in their trading expeditions from Santa Fe to Nacogdoches, especially when there was so good a route a little farther north, possessing all the requirements for prairie traveling.

"The Rio Rojo, or Roxo, upon Melish's map, is almost entirely south and west of the Wichita mountains, but in close proximity to them, which is in accord of my determination of the position of the North Fork, while there are no mountains upon the Prairie Dog Town branch.

"The head of the Rio Roxo, upon Melish's map, is put down as in the latitude 37°, while upon my map the true latitude is

35½°, while the Prairie Dog Town River rises in about 34½°, so that, if his Rio Roxo was intended to represent the 'Prairie Dog Town River,' it would be 2½° of latitude too far north." (Record, pp. 931 to 933.)

(4) But the testimony, we believe, demonstrates that the North and South Forks of Red River are laid down on the Melish map of 1818 and made part of the treaty, the confluence being just west of the 101st meridian of longitude, between 33 and 34 parallels of latitude. By the scale of this map the confluence is about 70 miles west of the intersection of the 100th meridian with Red River, and therefore the territory in controversy belongs to Texas. The propositions which we now purpose establishing are that the parties to the treaty were well informed of the geographical features of the country in the vicinity of the forks of Red River; in reference to these features they agreed upon the 100th meridian of west longitude, as laid down on the map of Melish, as the boundary line from Red River to the Arkansas, whether astronomically correct or not; that said boundary line was thus fixed by the map and with reference to the great natural landmarks shown on the face of the map; that its position so fixed is far east of the forks of Red River and of Greer county, and of the line now claimed by complainants to be the true 100th meridian; and that the map of Melish delineates the North and South forks of Red River and is substantially accurate. The position assumed by complainants, that the section of country in dispute was unknown to them and to the Spaniards, is thoroughly disproved by the record. It will be shown that it was known to the Spanish government and the United States in this order. The negotiations between the parties leading up to the treaty show that the territory which had been under discussion at the time of the treaty, was bounded on the south by a line along Red River, from the vicinity of Natchitoches to its head, and thence west to the Pacific Ocean, and on the north by a line from the mouth of the Missouri River westward to the Pacific Ocean, along the courses of the Missouri and Columbia Rivers; but that towards the close of the discussion, it was narrowed principally to the

region between the Red River, west of Natchitoches and the Arkansas.

The question of boundary had existed from the acquisition of Louisiana by the United States in 1803, and both parties to the treaty had, for many years, been informing themselves of this extensive region and its geographical outline.

The record shows that it was known to the Spaniards as early as 1541, when Coronado made a military expedition from the mouth of the Puerco or Pecos River, reaching the region of the Arkansas, Kansas and Platte Rivers, occupied by the Quivera Indians, subsequently, in 1778, called the Pawnees or Pananas by the Spaniards. (Record, pages 730 and 734.)

It was visited and occupied by them continually from that time until the date of the treaty from Santa Fe, as a base of operations, as shown by the record.

In 1601, by a military expedition by Governor Onate from Santa Fe, northeast to the Quivera or Pawnee country. (Record, page 730.)

In 1611, by a military expedition, which discovered the Colorado [Red] River, east of Santa Fe, (Record, page 731), this river evidently being the North Fork of Red River, which rises very nearly in the latitude of Santa Fe, which is in north latitude 35° 40′, according to Dr. Gregg (Record, page 856), the latitude of the head of the North Fork being 35½° north latitude (Record, page 933), and was neither the South Fork, which rises southeast of Santa Fe in north latitude 34½° (Record, page 933), nor the Canadian, which rises only about eighty or ninety miles north of Santa Fe (See the modern maps in the Record, and Record, page 427, Q. 35 to 51, and page 419, Q. 4 to 17), and must have been crossed by and known to Onate on his expedition of 1601.

Between 1611 and 1629, and in 1629, 1632 and 1650, the Spaniards from Santa Fe, besides visiting the regions of the Quivera or Pawnees, to the northeast, visited and established successful missions among the Jumanes Indians, in the region from 112 to 200 leagues east of Santa Fe, on a river which the friars named Rio de Nueces (Spanish for "nuts"), from the nuts growing there (Record, page 731), and thence went down the

river southeastward fifty leagues further, through the country of the Cuitoas (Quitreys), to the home of the Tejas (Texas), the former residing on the Trinity, and the latter on the Neches and Angelina. (Record, pages 860, 868, 869, and 731.)

In 1654 the Governor sent from Santa Fe another expedition to the Jumanes on the Nueces, and thence Andres Lopez was sent 30 leagues eastward, and met and defeated the Cuitoas (Quitreys) in battle, and returned to the Nueces with booty and prisoners. (Record, page 731.)

This river Nueces is described as being much farther north than that which bore the name later, the Nueces of Southern Texas, no doubt. (Record, page 731.)

This northern Nueces, from its locality, 112 leagues east of Santa Fe, is the Colorado River previously discovered by Gov. Onate, east of Santa Fe, in 1611, *and it is the north fork of Red River.*

It had the same situs at 112 leagues from Santa Fe which the North Fork has at that distance, to-wit, east of Santa Fe. (See the modern maps in the Record, Exhibit D to Cummins' deposition in Record, after page 984, and Record, page 983, Marcy's deposition, and Record, page 731.)

The name Nueces given it by the friars, is the name by which the North Fork is now known to the Mexicans. (Record, page 397, Q. 14 and 15.)

To this day the North Fork is known to the Indians by names meaning Nueces or Nut River; to the Kiowas by the name of Po-ho-nia-pau, meaning Nut River (Record, page 651, Q. 12, and page 656, Q. 21 and 22), and to the Comanches as Mobetia-hono, meaning Nut River,—either walnut or pecan. (Record, page 397, Q. 11 to 15; page 473, Q. 11 and 12; page 463, Q. 5 and 6; page 478, Q. 9 to 11; page 495, Q. 29 and 31; page 524, Q. 12, and page 530, Q. 6 and 7.)

The mountains on the northeast side of the North Fork were formerly known to the Mexican Ciboleras and Comanches by the name of the Jumanes, who lived on the Nueces, like the same mountains are now known by the name of the Wichitas, who according to their traditions, and much certain evidence, resided on the North Fork a long time. (Record, pages 858, 636 to 638;

page 645, Q. 6 to 12; page 646, Q. 4 and 7; page 626, Q. 7 to 36.)

The North Fork, considered as the upper Red River, like the Nueces, runs southeast to the region formerly the home of the Cuitoas (Quitreys), and of the Tejas, which was on the waters of the Trinity, Neches, and Angelina Rivers, at about 666 miles, or 250 Spanish leagues, from Santa Fe. (Record, Exhibit D, Cummins' deposition, after page 984; Record, pages 731, 860, 868 and 869.)

By way of the North Fork was the very excellent and only practicable route, at that early day, from Santa Fe to the region of the Cuitoas and Tejas on the Trinity, Neches, and Angelina Rivers, and over that route in 1849 was an ancient, deeply-marked wagon road from Santa Fe to the divide between the Canadian River and the North Fork. (Record, pages 932 and 979, Q. 11 to 16; also Record, page 893, and page 979, Q. 10 to 13.)

But after the great success of the Spanish mission to the Jumanes, in 1698 and 1700, there was fear of a French invasion. (Record, page 731.)

The French penetrated the far west, and established fortifications high up on the Missourri River, and about the close of the seventeenth century had reached the source of the Arkansas (Record, page 758), and in 1698 they had penetrated to the country of the Jumanes and the Navajos, northeast of Santa Fe, and destroyed 4000 of the latter and a town of the former. (Record, page 731.)

Later, in 1719, the Jumanes had become allies of the French (Record, page 732), and the Spaniards had made an expedition north, east, southeast and southwest back to Santa Fe, exploring what is now Colorado and Kansas, and meeting on the Arkansas the Apaches of Cuar-telego, a town 130 leagues from Santa Fe, and found men with gunshot wounds received from the French and their allies, the Pananas or Pawnees, and Jumanes; and the same year another force of Spaniards reached the river and villages of the Pananas, 360 leagues northeast of Santa Fe, and were there surprised and massacred by the Indians. (Record, pages 732 and 758.) This induced the French, with a large

force under Burgmont, to build Fort Orleans on an island in the Missouri, some distance above the Osage River. (Record, pages 759 and 830.) This fort was built about the beginning of the eighteenth century. (Record, pages 831, 832, and 761.)

In 1722, in the rule of Gov. Bustamente, of Santa Fe, it was charged that the Mexican traders went to Louisiana and bought twelve thousand dollars worth of goods, and this brought orders prohibiting such illicit traffic. (Record, page 732.)

In 1724, Burgmont, the French commander, made a journey to the Padoucas. (Record, page 831.)

In 1727, Bustamente notified the viceroy that the French had settled at Cuartelejo and Chinali, 160 leagues (426 miles) from Santa Fe. (Record, page 723.)

About 1729, ten years after the massacre of the Spaniards, mentioned above, who were sent out from Santa Fe about 1719 (Record, pages 732 and 758) to make an alliance with the Osages against the Missouris, but fell into the hands of the latter and were destroyed, a discoverer was sent from Santa Fe on various occasions, who made his journey to San Louis of the Illinois in twenty days, and to Nachitoches in about the same time. (Record, page 928.) This San Louis of the Illinois seems to have been a French establishment of Louisiana, near the Osages on the little river Illinois, which debouches into the Arkansas River opposite the mouth of the Canadian River (see Pike's map) at a point about 275 miles, by the scale of the map, northwest of Nachitoches. It could not have been the town of St. Louis of the Missouri, which was not founded till 35 years later (1764), and was about 950 miles in a straight line from Santa Fe, and would scarcely have been reached in less than five times the number of days it took this discoverer to reach San Louis from Santa Fe. But it was evidently the establishment of the Illinois, to which, we shall presently see, a road was laid out by Pedro Vial, 60 years later, in 1791, from Santa Fe (Record, pages 906 and 907); the same road, doubtless, by which Cockrell and his party travelled from Fort Smith to the forks of Red River in the spring of 1833. (Record, pages 906 and 907, and page 1347, Q. 3 to 16.)

In 1759, a party of 500 Spaniards and a large auxiliary of

Apaches, under Parilla, marched from San Antonio, Texas (Bexar), against the villages of the Taovayases, in the region later called San Teodora, and found there 6000 Indians in a strongly fortified position, armed with muskets and displaying the French flag, and were by them disastrously defeated, losing two pieces of bronze artillery. (Record, pages 783 and 893.) Shortly afterwards peace was made with those Indians, by Father Callahorra. (Record, page 733.)

It is matter of history that in 1762 the French transferred to Spain all the territory of Louisiana, and the contest between the Spanish and French, over the region between Red River and the Missouri, ceased, and the dominion of the Spaniards was undisputed.

In 1763, forty years before 1803, when he gave his narrative to Dr. Sibley (Record, pages 750 and 754), Mr. Brevil, a native of the old Caddo towns of Red River, Louisiana (Record, page 754), made a journey from the Panis nation, who lived about 50 leagues above where they lived in 1803, the date of his narrative, up the south side of Red River to its head, and across into New Mexico, to the waters that ran toward the west, in a region from which the Santa Fe country was southeast, returning to the Panis towns by way of the Santa Fe country. (Record, pages 754 and 755.) His narrative, as given by Dr. Sibley, was reported to Congress by President Jefferson in 1805. (Record, page 738 at top of page, pages 739, 747, 750, 754 and 755.)

In 1778, Mesieres, a Spanish officer, commandant at Nachitoches, went from San Antonio, Texas, on an expedition to the rancherias of the Taovayases (To-wa-ases), which he named San Teodora, and San Bernardo, on the *Upper Red River* (Record, page 734), which were two villages, one on the north and the other on the south side of the Rio Bermejo (Red River), of Nachitoches (Record, pages 886, 890 and 891); and in the middle of this river there was a salt bank (Record, page 891), and this bank of salt was in the North Fork of the three forks of the river, which unite near the villages. (Record, page 892.) He remarks in his report of the site of these villages, that it was the "key to the north," "that prompt and easy communication might be obtained with Nachitoches, the Illinois, New Mexico

and Bexar, *in the center of which this village is*, with no obstacles from rivers as far as Nachitoches when traveling eastward, while there is the advantage that to reach other localities west, north and south, rivers oppose no obstacles." (Record, page 893.)

These Tao-vay-ase (Ta-wa-ase) villages, expressly said to be on the Upper Red River (Record, page 734), and on the Red River of Nachitoches (Record, page 891), are an important link in the evidence in this case, because they are shown by the record to have been either identical with the old Wichita villages on the North Fork of Red River, at Devil's Canyon, or to have been in their immediate vicinity, or at a point seven miles west of that canyon, on that river.

The Taovayase were found by Parrilla, in 1759, in that region, afterwards called San Teodora. (Record, page 733.)

In 1778 they were found by Mesieres at the same locality, described as being on the Upper Red River and on the Red River of Nachitoches, near where its three forks unite. (Record, pages 892, 734 and 891.)

In 1763 these same Indians, known also as Panis, were residing in the same neighborhood, on Red River, which Mr. Brevil described as being 50 leagues above where they lived at that time—1803 (Record, page 754), but at that time, which was in 1803 to 1805, as shown by his report (Record, pages 750, 754 and 756), they resided on the south bank of Red River, and were known to the French as Panis and to the Spaniards as Towiaches. (Record, pages 747, 748.) Their towns were then 30 miles by land, and 60 by water, above the mouth of the False Ouchita. (Record, page 753.)

These Indians had various names, variously spelled, to-wit: Their oldest name, probably, was Jumanes, reasoning from their place of residence, 112 to 200 leagues east of Santa Fe. (Record, page 731.)

By Bancroft their name is spelled Taovayase. (Record, pages 733 and 734.)

In the Mesieres record it is spelled Tacobaianes (Record, page 862), Taobaine (Record, page 864), Taobayases (Record, page 880), Taovaiase (Record, page 891), Taobaoices (Record, page 892).

By Sibley they are called Panis or Towiaches, the former being the French name and the latter the Spanish, and located in 1803 thirty miles above the mouth of the False Washita. (Record, pages 747, 748.) Also Panis or Towrache (Record, page 753); and their old towns he represents as on the river fifty leagues higher up. (Record, page 754.)

By Stoddard they are mentioned as Pawnees, high up on Red River. (Record, page 765.)

By Darby, in 1817 (Record, page 823), they are called Panis or Towiache, and located on Red River at the 97th meridian. (Record, page 827.)

By Brevil, in 1803, they were called Panis, and their old towns said to have been fifty leagues above where they then resided. (Record, page 754.)

By the witness Nashtoe, for the complainants, it is shown that the Wichitas called themselves Kid-i-ki-tashe (Record, page 627), and were called sometimes Toyashe, which he pronounced Toy-way-i-hash (Record, page 632); and that the Kidikitashe or Wichitas called the Indians Toy-way-i-hosh who had a village on the side of the mountain, seven miles west of the old Wichita, or Kidikitashe, village (Record, page 633); and that the Kidikitashe or Wichitas were thought to be Pawnees by the white people a long time ago, and they, the white people, called them Pawnee-piqua. (Record, page 632.)

According to George Catlin and Lieutenant Wheelock of Colonel Dodge's expedition, in 1834 the Pawnee Picts were found on the bank of Red River, their villages enclosed by a stupendous range of reddish granite mountains, along the base of which the expedition travelled several days westward, a description which would be consistent with no locality on the South Fork of Red River, but does describe the region on the North Fork of Red River at the Wichita Mountains. (Record, pages 848, 853, 854; also, deposition of Marcy, Record, page 933; Corner's deposition, page 1367, Q. 32, deposition of Kennedy, Record, page 1315, Q. 2 to 5, 16 to 17; Meer's deposition, Record, page 588, Q. 18 to 47.)

By Catlin and Wheelock they were called Pawnee Picts. (Record, pages 847, 853 and 854). Also Toyash, by which Wheelock said they were correctly termed (Record, page 853);

and Bexar, *in the center of which this village is*, with no obstacles from rivers as far as Nachitoches when traveling eastward, while there is the advantage that to reach other localities west, north and south, rivers oppose no obstacles." (Record, page 893.)

These Tao-vay-ase (Ta-wa-ase) villages, expressly said to be on the Upper Red River (Record, page 734), and on the Red River of Nachitoches (Record, page 891), are an important link in the evidence in this case, because they are shown by the record to have been either identical with the old Wichita villages on the North Fork of Red River, at Devil's Canyon, or to have been in their immediate vicinity, or at a point seven miles west of that canyon, on that river.

The Taovayase were found by Parrilla, in 1759, in that region, afterwards called San Teodora. (Record, page 733.)

In 1778 they were found by Mesieres at the same locality, described as being on the Upper Red River and on the Red River of Nachitoches, near where its three forks unite. (Record, pages 892, 734 and 891.)

In 1763 these same Indians, known also as Panis, were residing in the same neighborhood, on Red River, which Mr. Brevil described as being 50 leagues above where they lived at that time—1803 (Record, page 754), but at that time, which was in 1803 to 1805, as shown by his report (Record, pages 750, 754 and 756), they resided on the south bank of Red River, and were known to the French as Panis and to the Spaniards as Towiaches. (Record, pages 747, 748.) Their towns were then 30 miles by land, and 60 by water, above the mouth of the False Ouchita. (Record, page 753.)

These Indians had various names, variously spelled, to-wit: Their oldest name, probably, was Jumanes, reasoning from their place of residence, 112 to 200 leagues east of Santa Fe. (Record, page 731.)

By Bancroft their name is spelled Taovayase. (Record, pages 733 and 734.)

In the Mesieres record it is spelled Tacobaianes (Record, page 862), Taobaine (Record, page 864), Taobayases (Record, page 880), Taovaiase (Record, page 891), Taobaoices (Record, page 892).

By Sibley they are called Panis or Towiaches, the former being the French name and the latter the Spanish, and located in 1803 thirty miles above the mouth of the False Washita. (Record, pages 747, 748.) Also Panis or Towrache (Record, page 753); and their old towns he represents as on the river fifty leagues higher up. (Record, page 754.)

By Stoddard they are mentioned as Pawnees, high up on Red River. (Record, page 765.)

By Darby, in 1817 (Record, page 823), they are called Panis or Towiache, and located on Red River at the 97th meridian. (Record, page 827.)

By Brevil, in 1803, they were called Panis, and their old towns said to have been fifty leagues above where they then resided. (Record, page 754.)

By the witness Nashtoe, for the complainants, it is shown that the Wichitas called themselves Kid-i-ki-tashe (Record, page 627), and were called sometimes Toyashe, which he pronounced Toy-way-i-hash (Record, page 632); and that the Kidikitashe or Wichitas called the Indians Toy-way-i-hosh who had a village on the side of the mountain, seven miles west of the old Wichita, or Kidikitashe, village (Record, page 633); and that the Kidikitashe or Wichitas were thought to be Pawnees by the white people a long time ago, and they, the white people, called them Pawnee-piqua. (Record, page 632.)

According to George Catlin and Lieutenant Wheelock of Colonel Dodge's expedition, in 1834 the Pawnee Picts were found on the bank of Red River, their villages enclosed by a stupendous range of reddish granite mountains, along the base of which the expedition travelled several days westward, a description which would be consistent with no locality on the South Fork of Red River, but does describe the region on the North Fork of Red River at the Wichita Mountains. (Record, pages 848, 853, 854; also, deposition of Marcy, Record, page 933; Corner's deposition, page 1367, Q. 32, deposition of Kennedy, Record, page 1315, Q. 2 to 5, 16 to 17; Meer's deposition, Record, page 588, Q. 18 to 47.)

By Catlin and Wheelock they were called Pawnee Picts. (Record, pages 847, 853 and 854). Also Toyash, by which Wheelock said they were correctly termed (Record, page 853);

and by themselves they were called Tow-ee-ahge. (Record, page 850.) One of them, "an intelligent Toyash," told Lieutenant Wheelock that their nation formerly lived south, and their oldest men were born there, which corresponds to their former residence, 30 miles above the mouth of the False Washita. (Record, page 854.)

The incident of the delivery by the whites and Osages of captured Pawnees (Kidikitashes), a boy and a girl, which was at the Toyash village on Red River in the mountains, by Col. Dodge and the Osages, in 1834, and the return of the white boy captive by the Pawnees to his people, and the firing of guns on that occasion by the soldiers are still remembered by the witness of complainants, Nashtoe, as the tradition of an incident which happened among the Wichitas, received by him from the old people of the Wichitas. (Record, page 632, Q. 35, 36 and 38). And this witness testified that formerly there were three bands, that were all the same, one called the Kidikitish, and then one the Toy-wah-cuddy, and the other named Waco. (Record, page 631, Q. 29.)

The complainants' witness, Horace P. Jones, testified that he thought the Wichitas, Tawakanies and Wacoes were three bands of the same people, and spoke the same language. (Record, page 507.)

The complainants' witness, Tawakanee Jim, a Wichita Indian chief (Record, page 633), relates the tradition of his people, the Kidikitish (Wichita), that their former residence, 500 years ago, was in two villages on the Kah-et-sodias River (identified by his testimony with the North Fork of Red River), in the mountains (Record, pages 637 and 638); and these villages, he says, were about a horseback ride in one day from Van Dorn's camp, which was toward the west at the end of the mountains, near another river at the foot of the mountains. (Record, pages 640 and 641, Q. 34 to 37.) Van Dorn's camp is shown by his own report to have been on the south side of Otter Creek, about 200 yards from Marcy's line marking the 100th degree of west longitude, and that he then suggested for that camp the name of Radziminiski. (Record, page 940.) By the deposition of Governor L. S. Ross, who selected the place under Van Dorn's orders, it is shown

to have been on the east side of the North Fork of Red River, on Otter Creek, about twenty miles from the junction of the North and South Forks of Red River. (Record, pages 953 and 954.) By the deposition of Dr. J. E. Swindells, who was with Van Dorn, it is shown to have been on Otter Creek, three or four miles from its mouth. (Record, page 1126, Q. 13.) By the testimony of General W. L. Cabell, who was an officer of the United States army, and was at Radziminiski, it was shown that it could not be more than three or four miles from the river, and was on Otter Creek. (Record, page 1141, Q. 22.) By evidence of complainants, a map of the leased portion of the Choctaw and Chickasaw Nation, filed with Major Emory's report in 1888, it is shown to have been south of Otter Creek, almost at the mouth, and scarcely four miles from the river, just north of latitude 34½°, and less than half a degree of latitude below the mouth of what must be Elm, but is marked on map as South Fork. (Record, page 162, and map attached.)

The testimony of Tawakanee Jim as to the tradition of the Wichitas, that they formerly lived on the Kah-het-sodias (North Fork), corresponds to, and is strongly corroborated by, the testimony of the following witnesses of complainants:

James Mooney (Record, pages 675 and 676).

Passmore (Record, pages 473 and 474, Q. 17 and 20 to 25).

A. J. Meers (Record, pages 189 and 190, Q. 33 and 34; page 581, Q. 24 to 29; pages 581 to 584, Q. 35 to 56; page 591, Q. 63 and 64.)

The locality of these ancient Wichita villages on the North Fork corresponds to that of the Taovaiase villages said by Messieres to be central between Bexar, New Mexico, the Illinois and Nachitoches. (Record, page 893.)

It therefore appears that the site of the old Wichita, Kidikitache, Toyash, Toweeahge, Panis, Pawnee Pict, Pawneepiqua, Pawnee, Toywayihash, Towiache, Towrache, Taovaiase, Taobaine, Taobayase, Tacobaine, and Taobaoice villages must have been on the North Fork of Red River and the Red River of Nachitoches, among the granite mountains, about one day's horseback ride from Van Dorn's camp, or the mouth of Otter Creek, near the mouth of Elm Fork of that river; and all of

these names designate one and the same people, and it is demonstrated that the North Fork of Red River is the Red River of Nachitoches.

Returning to the proposition that the region under discussion, at the time of the treaty, was well known to the Spaniards:

In 1778, the year of the Mesieres' visit to the Taovayases on Upper Red River of Nachitoches, from Bexar (San Antonio), Juan Bautisda de Anza was governor of Santa Fe, and his first recorded enterprise was a military expedition north and northeast, some 95 leagues, or 253 miles. The same year Padre Escalente described Quivera as the Pawnee villages, and in 1779, in connection with Anza's operations, Bernardo Miero y Pacheco made two maps, covering all the settlements of New Mexico, and about that time, each year, in July and August, the people met the tribes of the plains at Taos, where a grand fair was held. (Record, pages 734 and 735.)

After 1780 trade was carried on by both Spaniards and Indians with the northern gentiles and tribes, and each year a great caravan of traders went to Chihuahua to exchange products of the north for needed articles of merchandise.

In 1788, Francisco Xavier Fragosa, jointly with Pedro Vial, made a journey of discovery from Santa Fe to Nachitoches, whose itinerary has been preserved, and inserted in the Record, pages 908 to 913.

His itinerary mentions a number of places and streams, then bearing Spanish names, on the Blanco (South Fork of Red River) (Record, page 909), and in the region northeast and east of its forks, to-wit, Tierra Blanco, Rio del Tule, El Castor, Rio de las Plumas, San Diego, Juamanes, San Antonio, San Marcos, and San Jose, indicative of Spanish acquaintance or occupancy; and that to the north from the Blanco he saw the Juamanes hills, which, under the name of the Wichita Mountains, are mentioned by Dr. Gregg in his Commerce of the Plains, as known to the Mexicans by the name of the Sierra Jumanes, and as being north of the principal northern branch of Red River (Record, pages 909, 910 and 858), indicative of the region referred to.

In 1792 Senor Nava reported, in an official communication

from Santa Fe, an expedition by Pedro Vial, from which he returned November, 1791, to open a road to the establishment of San Louis of the Illinois, belonging to or dependency of the Province of Louisiana, *and also his opening a direct road from Santa Fe to the fort of Nachitoches and the Province of Texas.* (Record, pages 906 and 907.)

The Illinois was a small river entering the Arkansas River nearly opposite the mouth of the Canadian (Record, page 804), delineated on Pike's map of 1810, to be seen among the maps of the Boundary Commission of 1886 put in evidence by complainants, and mentioned by Lieutenant Wilkinson in his report of April 6, 1807, to the commander of the United States army, as occupying that geographical position (Record, page 804), while the fort of Nachitoches was better known to be on the Red River of Nachitoches, in Louisiana; both points, however, being eastward from Santa Fe, the one on the Arkansas River and the other on the Rio Roxo of Nachitoches, and about equidistant from the Taovayase villages on the upper Red River. (Record, page 893.)

In 1806 a Spanish force was sent from Santa Fe, under Lieutenant Don Facundo Malgares, into the country east and northeast of Santa Fe, which penetrated down Red River 223 leagues, or 594 miles, and then struck off northeast and crossed the country to the Arkansas, and reached the village of the Pawnee Republic. (Record, pages 785 and 786.) This expedition probably reached the Sabine, the head of which is in the northwestern part of Hunt county, Texas. (Record, page 784.) It also struck northeast as low down as the Grand Saline, as shown by Pike's letter to General Wilkinson (Record, page 807), which Saline is laid down on Pike's map as almost 200 miles, according to the scale of the map, southeast of the point where his own route intersected the Arkansas River, near the apex of the Great Bend, at which distance southeast from said intersection it would be about 120 miles northeast of the forks of Red River, according to modern maps in evidence.

This expedition consisted of 660 men, and had a cavalcade of 2075 horses and mules. They left Spanish flags with the Pawnees, which they were flying on the visit of Lieutenant Pike of

the United States Army, the same year (Record, pages 785, 786 and 787), who found and followed their freshly made trail more than 100 miles. (Record, pages 785 to 787.)

In 1806 also, Lieutenant Zebulon Pike of the United States Army, under orders of his government, was sent to the Great Bend of the Arkansas River, with instructions to reconnoitre that stream to its head, and to send a detachment to its mouth for the same purpose, which he did; but in so doing he was captured by the the Spaniards and taken to Santa Fe. (Record, pages 781, 782, 784 and 794.)

In 1815 Auguste P. Choteau and Julius De Mun, with a large party from the United States, went to hunt and trade with the Indians on the upper waters of the Arkansas. They visited Santa Fe in 1816.

Early in 1817 a Spanish force was sent out from Santa Fe to search for an American fort said to exist on the Rio de las Animas; the fort was not found, but by another party of Spaniards Choteau and De Mun and their party were arrested and taken to Santa Fe. (Record, page 736.)

In 1804 Major Stoddard of the United States Army was appointed to take possession of the Upper Louisiana, under the treaty of cession of 1803 (Record, page 758), and his sketches, historical and descriptive, of Louisiana were published in 1812. (Record, page 758.)

According to his sketches, while the French were in possession of Louisiana (prior to 1763), some of their traders transported merchandise by way of the Arkansas River to the Mexican Mountains, and established a trade with Indians and Spaniards of North Mexico; but the Spanish traders of Santa Fe procured their imprisonment (Record, page 759), and at the date of his sketches, the Spaniards from Santa Fe occasionally trafficked with the Indians of the Kansas and Platte Rivers (Record, page 765), and the Pawnees (a different people from those on the Platte) and other Indians, high up on Red River might obtain their supplies from the Americans, and thereby be prevailed on to break their connection with the Spaniards (Record, page 765), and that then the Spaniards already carried considerable specie

to Nachitoches, as also to the mouth of the Platte on the Missouri, where they met American traders. (Record, page 765.)

But there still remains to be mentioned perhaps the most conclusive evidence of the familiar knowledge the Spanish government had of the region under discussion.

On the face of the country, from the northeastern borders of Texas along the Red River to the head of the North Fork of Red River, there are still to be seen traces of Spanish civilization and enterprise, which show the occupancy of all that river, including the North Fork to its source, by the Spaniards, from ancient times to dates within the memory of men now living, while no similar or other signs of such occupancy by them have been discovered on the South Fork of that river.

About the year 1791 the Spanish Government, as we have seen (Record, pages 906 and 907), laid out two roads eastward from Santa Fe; one to a point in the Province of Louisiana known as the Establishment of San Louis of the Illinois, which was an eastern tributary of the Arkansas River, debouching into it nearly opposite the mouth of the Canadian, a western tributary of the same river, and the other to Nachitoches on Red River, in the Province of Louisiana.

These roads were by way of the North Fork of Red River, and the Kiowa and Panis villages on that stream; the former about 75 miles and the latter about 35 miles above its junction with the Prairie Dog Town River or South Fork of Red River, and passing down the North Fork, in places for some miles having two tracks, by reason of cut-offs, reached the junction of the North and South Forks of Red River on the east side of the North Fork, and there separated, one going toward the Illinois River, which lies a short distance west of Fort Smith, Arkansas, and the other crossing the river below said junction to the south side, and passing down that side of the river towards Nachitoches, dividing into several tracks in places, by reason of cut-offs; and the stream down which these roads passed was the stream known as the Rio Roxo de Nachitoches, the boundary line of the treaty of 1819, south and west of which is the territory of Greer County.

That the two roads were laid out from Santa Fe, the capital of

the Province of New Mexico, to the points mentioned above, is shown by the public archives of the Territory of New Mexico. (Record, pages 906 and 907.)

The points to which they were laid out, the Illinois River and Nachitoches, are both delineated on Pike's map accompanying his published account of his expedition up the Arkansas River, put in evidence by complainants; and that of the Illinois, by several modern maps in the Record (Mitchel's map of 1836, after page 294 of the Record), appears to be a little over one-half a degree west of Fort Smith, Arkansas, while that of Nachitoches appears to be on Red River, in the State of Louisiana. Mesieres describes these two localities as being about the same distance from the Taovayase villages as San Antonio and Santa Fe. (Record, page 893.)

The following facts in the Record show that these roads were laid out and became well travelled roads, to and from the North Fork of Red River:

There remains an old, well-worn and beaten road, long since fallen into disuse, but still visible and well marked on the face of the ground, from the northeast corner of Texas, up the south side of Red River, by way of an old Spanish fort in Montague County, on Red River, to a neighborhood above the mouth of the Wichita River, and thence across the Red River northward to the forks of the river, on the east side of the North Fork of Red River; thence up the same to the site of the old Panis villages, and to the site above occupied by the Kiowa Indians in 1833, about 75 miles above the forks of Red River; and thence by way of the head of the False Washita River toward Santa Fe, in places dividing into two roads where there are bends in the river, which road as far back as the memory of very old men reaches has been known and reputed, in the neighborhoods through which it passes, as the old Santa Fe Road from Nachitoches; and as late as 1819 was frequented by Mexican traders coming from Santa Fe, and as late as 1838 or 1839 was used by a party of Chihuahua traders coming from Santa Fe; while as late as 1833 there existed an old, well-worn, but disused, wagon road from the forks of Red River eastward to the region of the Illinois River, near Fort Smith, Arkansas, which was travelled by a large party

of men from Fort Smith to the forks of Red River in 1833, where it intersected the other old road from Nachitoches to Santa Fe.

These facts are shown by the testimony of Simon N. Cockrell, a brother of Senator Cockrell of Missouri, and Judge Cockrell, M. C., of Texas (Record, pages 1347 to 1352, and 1355 and 1356);

Of Dr. J. M. Fort (Record, pages 1339 and 1340);

Of Martin Ragsdale (Record, pages 1330 to 1333, and 1338);

Of Thos. F. Roberts (Record, page 1320, Q. 3 to 10; page 1322 to 1324, Cross-Q. 4 to 24; pages 1326 to 1327, Q. 1 to 11);

Of Richard Boren (Record, pages 1304 to 1307; page 1309, Cross-Q. 32 to 34, and page 1310 to 1314);

Of Solon A. Loving (Record, pages 1297 and 1298; pages 1301 and 1303, Cross-Q. 42 to 63);

Of Jose Martinez (Record, pages 1260 to 1263 inclusive; page 1267, Q. 99 to 102);

Of Wm. Ish (Record, pages 1286 to 1289, Q. 46 to 66);

Of J. M. Passmore, a witness for complainants (Record, pages 475 and 476, Q. 30 to 33, and 36 to 39; page 483, Cross-Q. 105 to 107; page 485, Recross-Q. 1 to 6);

Of Gen. H. P. Bee (Record, page 1223, Q. 17; page 1227, Cross-Q. 30);

Of Col. John S. Ford (Record, pages 1232 and 1233, Q. 31 to 37; page 1236, Cross-Q. 26 to 40);

Of Gen. R. B. Marcy (Record, page 930 to 932, last paragraph);

Of Thomas K. Carmack (Record, pages 1212 to 1213, Q 11 to 30);

Of Geo. W. Briggs (Record, page 1066, Q. 2 and 3; page 1067, Q. 23 to 30; page 1070, Cross-Q. 25 to 33; page 1072 to 1079, Redirect-Q. 2 to 6);

Of W. E. Gates (Record, pages 1106 and 1307, Q. 16 to 23);

Of R. H. Burnett (Record, page 1256, Q. 9; page 1257, Q. 17 to 22; page 1250, Cross-Q. 18 to 20);

Of the Indians, Nashtoe, Chewahstalk, Chaddlekaungky, and Tarpony (Record, pages 629 and 630, Q. 1 to 12; page 646, Q. 7 to 30; page 658, Q. 51, 52; page 532, Q. 23).

The ruins of a number of old Spanish villages and fortifications still exist along the route of the old Nachitoches and Santa Fe road, on the North Fork of Red River, and on this river below its junction with the Prairie Dog Town River, which conclusively demonstrates our proposition of familiar knowledge with the North Fork, and show the reason for the old road, and why the North Fork was deemed and named the Red River of Nachitoches, while the absence of any such evidence of occupancy and familiar knowledge of the Prairie Dog Town River country equally demonstrates the improbability that it was ever deemed the Rio Roxo of Nachitoches prior to the treaty of 1819.

The existence of these ruins is shown by the depositions of

W. F. Cummins, Assistant State Geologist of the State of Texas, who excavated a great number of rectangular mounds of the ruins of the Mexican town at Devil's Canyon, on the North Fork of Red River, in 1891 (Record, page 966, Q. 7 to 24; page 968, Q 20);

A. J. Meers, witness of complainants (Record, page 581, Q. 24 to 56; page 591, Cross-Q. 62 to 66);

J. W. Passmore, witness for complainants (Record, page 474, Q. 35 to 39; page 479, Cross-Q. 47 to 70; page 482, Cross-Q. 80 to 87; page 483, Cross-Q. 99 and 100);

C. F. Doan, a witness of complainants (Record, pages 363 and 364, Q. 44 to 57);

James T. Pollard (Record pages 1083 to 1085, Q. 54 to 66);

W. E. Gates (Record, page 1106);

S. H. Tittle (Record, page 1120, Q. 15 to 22, Cross-Q. 1 to 4);

Wm. Ish (Record, page 1224, Q. 25 to 30, page 1286, Q. 46 to 66);

Simon N. Cockrell (Record, page 1347, Q. 3 to 16, page 1349. Q. 29 to 37, Q. 44 to 45).

The existing tradition representing the old road as the Nachitoches and Santa Fe road is strongly corroborated by the actual residence of Mexican miners at the Wichita Mountains, and a Mexican shepherd five miles above where the miners lived; who were seen there by Simon Cockrell between 1833 and the close of 1835 (Record, page 1347, Q. 3 to 6), as well as the presence of the old Wichita villages and among the Kiowas on the North

Fork, of both Mexicans and very white men, the former coming from the west and the latter from down the river, who traded with the Indians on the North Fork of Red River a great while ago, according to their tradition, as narrated by Nashtoe and Chewahstalk, witnesses for complainants. (Record, pages 629 and 630, Q. 1 to 12, page 646, Q. 7 to 30.) Also by Chaddlekaungky, the Kiowa judge. (Record, page 658, Q. 51 and 52.) Also by Tar-pony or Heart-Beat, a Comanche. (Record, page 532, Q. 23.)

A considerable effort has been made to prove that the old Santa Fe Road, passing close by the Narrows, and about 20 or 22 miles from the Mouth of Otter Creek, on its west side (Record, page 564), in the Wichita Mountains, was made by Van Dorn's train in going to his camp on Otter Creek, called by him Radziminski, and to identify the old ruins near the old road at the Narrows, with the soldiers' camp of Radziminski.

But Van Dorn's own report, which is found in the Record, and the map of the leased portion of the Choctaw and Chickasaw Nation in the Record, just after page 162, upon which Van Dorn's camp is laid down, conclusively show it to have been almost immediately at the mouth of Otter Creek, on its southeast side; Van Dorn himself stating that the camp is by a good spring and 200 yards east of Marcy's line marking the 100th meridian of west longitude, which Marcy described as being about four miles from the mouth of Otter Creek, and 20 miles northward from the river. (Record, pages 97 and 948.)

This fact is also proved by the deposition of Dr. Swindells, who accompanied Van Dorn as a soldier (Record, page 1126, Q. 10 to 15);

Of General W. L. Cabell, an officer of the United States army, and acting quartermaster (Record, page 1139, Q. 12; page 1140, Q. 22; page 1137, Q. 3 and 4);

Of Gov. L. S. Ross, who selected the location for Van Dorn, under orders from Van Dorn. (Record, pages 953 and 954, Q. 7 to 13.)

That the old ruins at the Narrows were not the remains of Van Dorn's camp (Radziminiski), or any soldiers' camp made about that period or afterward, is evident from the testimony of Ta-ba-

yeschen, or the Rising Sun, a witness for the United States, who was sixty years old when he testified, and testified that he saw on Otter Creek the old chimneys and ruins near the old road when he was 20 years old, or forty years before he testified in 1894, that is, in 1854; and testified that those old ruins were there then, as ruins, and the old road also, which, therefore, was four years before Van Dorn went to that country in 1858. (Record, pages 523, 524, and 525, Q. 17 to 22.)

Two of complainants' witnesses, Casimero Romero and H. Kimball, have testified to trails, not roads, along the Tierra Blanco Canyon to Santa Fe, from the junction of that stream with the Palo Duro Canyon, but it will be noticed that Romero was sixty years old when he testified, and that he first visited the junction of these streams when he was 17 or 18 years old (which would have been in 1852 or 1853), and that the trail was not there then. (Record, page 426, Q. 16 to 20; page 418, Q. 22 and 23; page 420, Cross-Q. 27 to 30; page 421, Cross-Q. 34 to 37.)

This modern trail is the only thing like a road along any part of the South Fork of Red River, that appears from the testimony of complainants' witnesses or any other evidence in the record, and the witness Romero says it was not a road (Record, page 426, Cross-Q. 19), and did not exist there in 1852, when he was first there.

The existence of the old road and the old ruins along the North Fork accords with the fact, that as late as 1804 Humbolt delineated on his map four road stations, or stations of muleteers, as he calls them, on Red River (Record, page 1391, Redirect-Q. 28 and Exhibit I, of Corner's deposition), which were named San Calixto, Canoatinos, Canesis, and Quichicans.

The old chimney found by the witness Cockrell in 1833 at the forks of the river, where the North Fork bends in its upward course northward, probably was the remaining vestige of the old station of muleteers called Canoatinos, which is laid down at the bend northward of Red River in its upward course by this geographer.

The old ruins at Devil's Canyon, where Doan, a witness of complainants, saw years ago ruins of stone chimneys and log huts, and Cummins exhumed metates and gun flints from square-

cornered adobe structures, now melted into piles of earth; and where Passmore and Blaylock, witnesses of complainants, found an irrigation ditch to a valley farm discovered by Passmore; and in the neighborhood where Cockrell saw a village of Spanish miners in 1833 to 1835, where he afterwards saw the chimneys in ruins (Record, pages 363, 364, Q. 42 to 57; page 966 and page 582, Q. 36; page 591, Q. 22 to 64; page 460, Q. 30 to 36; page 482, Q. 87; page 1350, Q. 32); where Martinez saw deep holes like wells, buildings made of pickets, a stone structure in ruins, old vessels, pieces of dishes and old pots in 1858 (Record, page 1271, Q. 156 to 158; page 1271, Q. 161); and near where Martinez and Wm. Ish saw other ruins (Record, page 1270, Q. 144 to 150; page 1288, Q. 64 to 66); and Ta-Ba-Yerchen, when 20 years old, in 1854, saw chimneys in ruins (Record, page 525, Q. 17 to 21); where Settles found old tools, pieces of iron and copper, Spanish crucibles, whetstones, etc.; and six miles distant a miner's shaft (Record, pages 1043 and 1044, Q. 22 to 28); where Briggs saw a heap of cedar logs and posts buried in the ground (Record, page 1072, Q. 10); near where Pollard found a miner's shaft about 18 feet deep, a pile of ashes, some picks and a part of a crucible, and other indications of Mexican miners, such as he had seen used by Mexicans (Record, page 1083, Q. 58 and 62), and also adobe and stone walls in ruins (Record, page 1085, Q. 65); where Tittle found old rock walls and fireplaces (Record, page 1122, Q. 15 to 22 and Cross-Q. 1 to 4); and where Meers noticed rectangular mounds about 8 by 16 feet, at every one of which he found a metate, and where he found pipes made of soft stone, pieces of copper and silver plate clipped into wire as with scissors, a silver ball cast about a wire, making a round button (Record, page 582, Q. 36 to 38). These correspond to the station of San Calixto, which is laid down by Humbolt as on the north side of Red River, near the point where, in its upward course, it bends to the west, as the North Fork of Red River does not far from Devil's Canyon, while the old Spanish fort in Montague county and the ruins 25 miles above, mentioned by the witness Pollard, are the sites of Quichicans and Canesis. (Record, Humbolt's map among the Boundary Commission maps, and pages 1349 and 50, Q. 29 and 30.)

In this connection it is worthy of particular attention, that the Record develops no evidence of any old road or any ancient settlements, either of whites or Indians, along the South Fork below the confluence of its canyon sources, Tierra Blanco and Palo Duro, a distance of 100 miles from its confluence with the North Fork.

It is shown by the testimony of General Marcy (Record, page 932), of Jose Martinez (Record, page 1266, Q. 84 and 85; page 1267, Q. 99 to 101), and of James T. Pollard (Record, page 1077, Q. 1; page 1078, Q. 41 to 43), that at an early day, before the settlement of the country by the white people, they traversed the region of the South Fork and had a good opportunity to observe, but they discovered no signs of either roads or ancient settlements.

The circumstances under which these witnesses visited that region were well calculated to discover such signs if they existed.

General Marcy gives an adequate explanation of their absence, in the bitter and unwholesome character and properties of the water. (Record, page 932 and 933.)

The ancient itinerary of Fragosa, found in the Record, reveals two other conclusive reasons why this stream, below its canyon sources, would be without roads or other signs of habitations.

Fragosa as early as 1788 made a journey of discovery, under orders of the Spanish authorities, from Santa Fe to the head of the Rio Blanco, and down its southern side. (Record, pages 908 to 912.)

He described it and its confluents so accurately that it is identified by Major Livermore with the Kecheaquehono, the South Fork of Red River. (Record, page 271, Q. 17 to 19.)

With a modern map before us, his Rio del Tule is recognized as the Palo Dura Canyon; his Rio de la Plumas, where the hills called Juamanes were seen north of the river, as Mulberry Creek; his next and wider river coming from the north, where the hills and river became level, as the Salt Fork; and his fourth river coming from the north, as the North Fork of Red River.

It will be observed, that each day he noted in his itinerary the characteristics of the country in respect to its surface, soil, water, fuel, and grass, and it is notable that in the twenty days journey

from Santa Fe to the confluence of the North Fork of Red River with the Blanco, there were ten days in which he mentioned neither fuel nor grass, excepting a single cottonwood tree, and during the last three days of the twenty he traversed the distance of thirty-five leagues, each successive day failing to note either grass or fuel. (Record, page 908 to 912.)

It is not strange that Fragosa found neither grass nor fuel along this stretch of about 100 miles of the lower part of the South Fork, for it is described by numerous witnesses, of both complainants and defendant, as being, in that part, a great bed of sand, entirely destitute of water upon its surface, except in times of freshets, and about the mouths of its affluents, and then for only two or three weeks at a time would it be a flowing stream.

Some of the complainants' witnesses who have testified to this effect are Goodnight (Record, page 402), John Burdick (Record, page 521), I. L. Barnett (Record, page 409), J. T. Tierce (Record, page 454, Q. 5), F. M. Maddox (Record, page 333), J. R. Byers (Record, page 211, Q. 3 and 4.)

To the same effect is the testimony of the following witnesses of defendant: George W. Briggs (Record, page 1066, Q. 12), J. F. Crabtree (Record, page 1099, Q. 4 to 8), H. C. Sweet (Record, pages 1112 and 1113, Q. 6 to 11), W. L. Cabell (Record, page 1138, Q. 7 to 8, 13 and 14), J. P. Smith (Record, page 1160, Cross-Q. 30 to 31), and Jose Martinez (Record, pages 1267 and 1268, Q. 104 to 116).

But we have found from the Record, in striking contrast with this picture of sterility, that the whole region from Santa Fe to the home of the Pawnee Picts, on the North Fork of Red River, and down that river to Nachitoches, is marked with ancient signs that it was well known to and inhabited by the Spaniards.

Finally, as showing a knowledge of the country by Spain, Mesieres visited the forks of Red River in 1778 (Record, page 892), and his report of the expedition was used in forming the treaty by his government. (Record, page 929.)

The same region was likewise well known to the government of the United States at the date of the treaty, especially along its northern border, and along the Arkansas River, and at the point of in-

tersection of that river by the 100th meridian, as laid down on Melish's map.

In 1803, the United States having arranged for the acquisition of Louisiana, both Upper and Lower, sent out Messrs. Lewis and Clark to explore the country between the mouth of the Missouri and the Pacific Ocean. These men performed this task with such wonderful fidelity, that their fame has to this day reached the ear of every schoolboy in the land; and their reports show that at that time the whole region between the Arkansas and Missouri rivers was occupied by American, English, and French traders.

They were particularly instructed by President Jefferson in these words, to-wit: "Although your route will be along the Missouri, yet you will endeavor to inform yourselves by inquiry of the character and extent of the country watered by its branches, and especially on its south side. The North River, or Rio Bravo, which runs into the Gulf of Mexico, and the North River, or Colorado, which runs into the Gulf of California, are understood to be the principal streams heading opposite the headwaters of the Missouri, and running southwardly. Whether the dividing grounds between the Missouri and them are mountainous or flat lands, what are their distance from the Missouri, the character of the intermediate country, and the people inhabiting it, are worthy of particular attention." (Record, page 768.)

They met and had dealings and intercourse with divers traders from St. Louis, who traded up the Osage, Platte, and Kansas Rivers, and reported minutely the character of the country and its population, even extending to the Pawnees on Red River. (Record, pages 772 and 780.)

The statistical table prepared by them, to which the attention of the United States Congress was called by President Jefferson in his special message, in 1808, shows a minute knowledge of the localities occupied by the Indians from the mouth of the Canadian to the head of the Arkansas, Platte, and Kansas rivers, as well as minute statistics of their numbers, character, habits, association, commerce, the people with whom they traded or were at war, and their condition generally. (Record, pages 738, 740 to 747.)

In 1806 the United States Government sent Lieutenant Zebulon

Pike of the army, with an escort, to get geographical and such other knowledge of the country along the southern boundary of Louisiana as would enable the government to enter into a definitive treaty of demarcation between that territory and North Mexico. (Record, pages 780 and 781.)

That he discharged his duty well and thoroughly, is shown by his published report. (Record, pages 784, 785, 788 to 794.)

His route to and from, and about, the point where he struck the Arkansas River was so minutely described and mapped, in reference to rivers, creeks, ponds, low prairie, change of range of hills on the banks of the river, and the relative position of these features of the country to each other, as to identify the point beyond peradventure. (Chas. Corner's deposition, Record, pages 1368 to 1370, Q. 35 to 36, and the original Exhibit B, accompanying his deposition, which is not fully represented in the printed Record; also Record, pages 780, 789, Oct. 14th to Oct. 18th.)

Some of the minute and precise and varied information given his government by Pike, about the region of the country under discussion, illustrative of the balance, may be seen in the Record, pages 795 to 797, inclusive.

It is to be particularly noticed that he mentions that the trade of the Osages, who resided near and on the Arkansas River, near the western line of the State of Arkansas, had been in the hands or control of Pierre Choteau (the founder of St. Louis, whose history is the early history of the Great West) about 32 years prior to his narrative. (Record, page 796.)

The like particular and minute information about the geography, topography and general characteristics of the country from the Great Bend of the Arkansas to its mouth, given by Lieutenant Wilkerson, may be seen in the Record, pages 799 to 804.

In 1806, President Jefferson communicated to Congress an account of the Indians residing in and adjacent to the territory of Orleans, and a description of Red River from its source to its mouth, including the locality between the old Panis villages on Red River, and New Mexico, which was prepared by Mr. Sibley, an Indian agent of the United States, extracts from which in the Record show particular information of the Red River country, as far up

as the site of the old Panis, Towiache or Taovayase villages, described by Mesieres as being on the Red River or—Nachitoches, and by numerous witnesses shown to be in the mountains at Devil's Canyon, on the North Fork of Red River, as we have already shown. (Record, pages 738, 747 to 757.)

In 1810 Pike's expedition up the Arkansas was published with maps and charts. It appears on the face of those maps that it was known in the United States that the "Acadians" (French people from Louisiana) had visited Santa Fe, and returned down Red River, and had descended the river in bark canoes from a point about 60 miles above the old Caddo towns, in 1741. That in 1741 and 1742 Mr. Fabry had wintered on the Canadian River as much as 120 miles above its mouth, by the scale of the map, and that the Spaniards had a fort on Red River at a point north of the headwaters of Trinity River, known as Fort Tawayhays, in the neighborhood of the Indians of that name (the Tawaiaches, now called Wichitas), and that there was a trading house on the Arkansas River a short distance above the mouth of the Verdigris River; and that the Grand Saline (mentioned by Pike in his letter to General Wilkerson, in 1806, Record, page 807, as a point reached by the Spanish expedition under Malgares in that year) was located almost centrally between Red and Arkansas Rivers, far southeast of the apex of the Great Bend of the Arkansas River, and not a great way from the village of the Grand Pest (Osage Village), and the trading house on the Arkansas aforesaid. (See both maps of Pike.)

On the face of the same maps it conspicuously appears that the United States, by Officers Wilkerson and Pike, had made careful and precise reconnoissance of all the region along the Arkansas River, from its mouth to its source, and especially about the apex of the great bend of the Arkansas, at which Wilkerson and Pike had camped and separated, one to explore the river to its mouth, and the other to explore it to its source; and at which the boundary line of the treaty, the 100th meridian of Melish's map, intersected the river.

Between 1812 and 1815, Dr. Sibley, Indian factor of the United States Government at Fort Osage, made a report to the government, giving a clear statement of the localities occupied by the

Osages at that time, showing particular knowledge of the regions about the Neosho and Verdigris Rivers, which enter the Arkansas not far from the mouth of the Illinois River, to which the Spanish road from Santa Fe was laid out by Pedro Vial in 1791. (Record, page 837.)

In 1812 it was said muskets and powder were obtained in New Mexico, from gun factories established by the Americans among the Jumanes. (Record, page 735.)

In 1812, Major Stoddard, of the United States army, who was appointed to take possession of Upper Louisiana in 1804, published in his sketches of Louisiana that the Spaniards carried considerable quantities of specie to Nachitoches and the Platte River, exchanging it for merchandise, which is corroborated by the deposition of Martin Ragsdale. (Record, pages 765 and 1332.)

In 1815 a party of American traders, under Choteau and De Mun, established themselves near the head of the Arkansas River, and were captured by the Spaniards in 1817, which event was communicated by the President to Congress in 1818. (Record, pages 735 and 736.)

In 1817 Darby's Geographical Description of Louisiana was published, together with his map of Louisiana and Texas. The extracts from it in the Record show, with slight exceptions, as clear and truthful outline of the geography and topography of the region between the Red River and the Arkansas, as would be expected at the present day. (Record, pages 822 to 828.)

He described the locality of the Wichita Mountains, which he called a spur of the Taous Mountains, as on the left of Red River, and the False Washita as rising to the north of Red River, and with particularity locates the Panis or Towiache new towns, with reference to the distance from the intersection of the 32nd parallel of latitude with the Sabine, and at the intersection of Red River by the 97th meridian of west longitude, noting a range of hills on the south of the river, a locality Sibley gives as 30 miles in a straight line from the mouth of the False Washita. (Record, pages 753, 827 and 828.)

It is also worthy of remark, that the relative locality of the old Panis or Towiache (Taovayase) towns to that of the new Panis towns, 30 miles above the mouth of the Washita, to-wit,

as the site of the old Panis, Towiache or Taovayase villages, described by Mesieres as being on the Red River or—Nachitoches, and by numerous witnesses shown to be in the mountains at Devil's Canyon, on the North Fork of Red River, as we have already shown. (Record, pages 738, 747 to 757.)

In 1810 Pike's expedition up the Arkansas was published with maps and charts. It appears on the face of those maps that it was known in the United States that the "Acadians" (French people from Louisiana) had visited Santa Fe, and returned down Red River, and had descended the river in bark canoes from a point about 60 miles above the old Caddo towns, in 1741. That in 1741 and 1742 Mr. Fabry had wintered on the Canadian River as much as 120 miles above its mouth, by the scale of the map, and that the Spaniards had a fort on Red River at a point north of the headwaters of Trinity River, known as Fort Tawayhays, in the neighborhood of the Indians of that name (the Tawaiaches, now called Wichitas), and that there was a trading house on the Arkansas River a short distance above the mouth of the Verdigris River; and that the Grand Saline (mentioned by Pike in his letter to General Wilkerson, in 1806, Record, page 807, as a point reached by the Spanish expedition under Malgares in that year) was located almost centrally between Red and Arkansas Rivers, far southeast of the apex of the Great Bend of the Arkansas River, and not a great way from the village of the Grand Pest (Osage Village), and the trading house on the Arkansas aforesaid. (See both maps of Pike.)

On the face of the same maps it conspicuously appears that the United States, by Officers Wilkerson and Pike, had made careful and precise reconnoissance of all the region along the Arkansas River, from its mouth to its source, and especially about the apex of the great bend of the Arkansas, at which Wilkerson and Pike had camped and separated, one to explore the river to its mouth, and the other to explore it to its source; and at which the boundary line of the treaty, the 100th meridian of Melish's map, intersected the river.

Between 1812 and 1815, Dr. Sibley, Indian factor of the United States Government at Fort Osage, made a report to the government, giving a clear statement of the localities occupied by the

Osages at that time, showing particular knowledge of the regions about the Neosho and Verdigris Rivers, which enter the Arkansas not far from the mouth of the Illinois River, to which the Spanish road from Santa Fe was laid out by Pedro Vial in 1791. (Record, page 837.)

In 1812 it was said muskets and powder were obtained in New Mexico, from gun factories established by the Americans among the Jumanes. (Record, page 735.)

In 1812, Major Stoddard, of the United States army, who was appointed to take possession of Upper Louisiana in 1804, published in his sketches of Louisiana that the Spaniards carried considerable quantities of specie to Nachitoches and the Platte River, exchanging it for merchandise, which is corroborated by the deposition of Martin Ragsdale. (Record, pages 765 and 1332.)

In 1815 a party of American traders, under Choteau and De Mun, established themselves near the head of the Arkansas River, and were captured by the Spaniards in 1817, which event was communicated by the President to Congress in 1818. (Record, pages 735 and 736.)

In 1817 Darby's Geographical Description of Louisiana was published, together with his map of Louisiana and Texas. The extracts from it in the Record show, with slight exceptions, as clear and truthful outline of the geography and topography of the region between the Red River and the Arkansas, as would be expected at the present day. (Record, pages 822 to 828.)

He described the locality of the Wichita Mountains, which he called a spur of the Taous Mountains, as on the left of Red River, and the False Washita as rising to the north of Red River, and with particularity locates the Panis or Towiache new towns, with reference to the distance from the intersection of the 32nd parallel of latitude with the Sabine, and at the intersection of Red River by the 97th meridian of west longitude, noting a range of hills on the south of the river, a locality Sibley gives as 30 miles in a straight line from the mouth of the False Washita. (Record, pages 753, 827 and 828.)

It is also worthy of remark, that the relative locality of the old Panis or Towiache (Taovayase) towns to that of the new Panis towns, 30 miles above the mouth of the Washita, to-wit,

a point 50 leagues, or 150 miles, above the new towns, was known to the United States Government through the report of Sibley and Brevil, before mentioned (Record, pages 753 and 754), communicated to Congress by the President in 1806.

The two distances, 30 and 150 miles, would reach in a straight line from the mouth of the False Washita to the region of the mouth of Elm, on the North Fork, or the site of the old ruins of the Panis towns, as shown by the evidence already referred to.

It will appear how fairly correct the descriptions of Darby of the region under discussion were, if, for instance, his description, as contained on pages 824 and 825 of the Record, be compared with that of Major Long of the United States Army, from personal observations in 1820 (Record, pages 838 to 845, especially pages 843 to 845); with Catlin's and Wheelock's descriptions of the Wichita Mountains and adjacent country and their relative positions to the Red River (North Fork) at and east of the Toyash or Pawnee village (Record, pages 848 and 849, 853 and 854); with that of Dr. Gregg's reference to mountains and the North Fork of Red River, in the Record, page 856, last paragraph, and 857 and 858; with the depositions, so far as they refer to mountains, of R. B. Marcy (Record, page 933), of William Ish (Record, pages 1283 to 1286, Q. 2 to 45), of M. W. Hudson (Record, pages 1242 and 1243, Q. 8 to 19), of Joe McAskill (Record, pages 1246 to 1247, Q. 5 to 21), of J. E. Shipe (Record, pages 1250, 1251 and 1252, Q. 2 to 13, and Cross-Q. 18 and 19), and of S. B. Kennedy (Record, pages 1315 to 1317, Q. 2 to 28); and then with Melish's map in reference to mountains on the northeast side of the North Fork of Red River, and with the testimony of the following witnesses of complainants: C. F. Doan (Record, page 359, Q. 43 to 48; page 866, Cross-Q. 93 to 96), A. J. Meers (Record, pages 758 and 759, Q. 14 to 20; pages 588 and 589, Cross-Q. 18 to 47), and of Chas. Corner (Record, page 1367), a witness for defendant.

That the United States Government, before the date of the treaty, had at command abundant means of knowledge of the whole country from the junction of the Verdigris, Canadian and Illinois Rivers with the Arkansas, described by Lieutenant Wil-

kerson (Record, pages 803 and 804), to the head of the latter, and from the mouth of Red River to the home of the Panis on the North Fork of Red River, which was utilized till the date of the treaty, is shown not only by the expeditions of Lewis and Clark, and of Pike and Wilkerson, in 1803 and 1806, the appointment of Stoddard to take possession of Lower and Upper Louisiana, in 1804, the reports of Sibley in 1805, and between 1812 and 1815, and the enterprise of Astor and Hunt under the auspices of the government, commenced in 1810, which have been cited, but the fact is emphasized by the numerous traders, resident white men and explorers, who were in the region in question at different periods of time from 1763 to the date of the treaty, and were met by these agents of the government, and are mentioned in the Record. (Record, pages 772 to 780, 788, 796, 798, 780, 801, 803 to 805, 808 to 822, 828, 831, and 832, 834 to 837, 750, 752, 753, 762 to 765, 859.)

In 1818, January 1, John Melish published in the city of Philadelphia general geographical information of the immediate region under discussion, including the recent investigations of Bringier and Darby (Record, pages 86 and 87), in his "Geographical Description of the United States," and the accompanying map, which was made the map of the treaty of 1819. (Record, page 87.)

In this Geographical Description he represented Red River as rising eastward of Santa Fe, and he delineated the head of the North Fork of that river on his map in that relative direction from that city which corresponds with the actual relative direction of the head of the North Fork from Santa Fe, as shown by the modern maps.

What more especially shows the precise and accurate geographical knowledge possessed by Melish of the immediate region in controversy, is the approximately correct delineation of several of its most prominent topographical features in their relative position to other great natural features of the country, which appear in bold relief on this map of the treaty.

Looking at the map, and along the 100th meridian of west longitude between the Red and Arkansas Rivers, we are struck with the aptness of the language of the treaty, that it was "in-

tended to designate with precision the limits of the respective bordering territories;" for on both sides of that line we see delineated great natural landmarks which, if they exist on the ground, must necessarily fix and determine its locality with remarkable precision.

The parties to the treaty were both definitely notified by this map that the Red River forked west of that line, at a point nearly due south, but a little east of south, and about 207 miles by the scale of the map from the apex of the Great South Bend of the Arkansas River, and south of a mountainous region that extended along the North Fork on its north side toward the northwest, and then northward to the Arkansas River; and that to the northeast of that South Bend of the Arkansas River, and in close proximity to the 100th meridian limit, lay the apex of a Great North Bend of the same river; while close by, but on the opposite side of that meridian, was the notable point where Pike had commenced his explorations of that river, under the auspices of the United States Government, in 1806, and that from the apex of that North Bend the river took its course in a long stretch to the southeast, till it reached the neighborhood of several contiguous and peculiarly shaped bends, about the mouth of Jefferson River, in a region northeast from the forks of Red River, and southeast from the South Bend of the Arkansas. And especially were they notified by this map that both of the forks or branches of Red River, and all of their headwaters, lay west of that line agreed upon as a boundary from the Red River to the Arkansas.

It is obvious from the Record, that these several great natural features and outlines exist on the ground in the corresponding relative position to each other and to Melish's 100th meridian delineated on this map, and that the information by which these striking correlations were delineated must have been remarkably accurate for that day and time; and that the allegation of plaintiff, that in fact Melish had no knowledge of the existence of said forks of Red River, is untrue and reckless.

The forks of Red River are found in the relative position delineated.

The Record shows that those forks have been found by careful astronomical observation to be about 227 miles south and 36

miles east of the apex of a Great South Bend of the Arkansas River. (Record, page 1365, and Exhibit B of Corner's deposition, 2nd map after 1392.)

It shows that the mountainous country north of the forks and north of the North Fork, and extending northward toward the Arkansas River, exists on the ground. (Record, pages 1366, 1367; page 1348, Q. 14; page 1350, Q. 33 to 42; page 1354, Cross-Q. 31 to 34; pages 1283 to 1286, Q. 7 to 45; page 1250, Q. 1 to 13; pages 1246 to 1248, Q. 1, 5, 8 to 17; page 1283, Q. 8 to 19; page 1315, Q. 2, 5, 10, 16 to 28; pages 838 to 842 and 843 to 845; page 848; page 853; page 1060, Q. 98 to 105; page 1122, Q. 20; page 190, Q. 34, Cross-Q. A to 13; page 366, Q. 93 to 96; page 579, Q. 14 to 20; page 588, Cross-Q. 18 to 25, 29 to 47.)

It shows that the apex of a Great North Bend of the Arkansas River, to the northeast of the apex of the South Bend, exists on the ground, in close proximity to the point where Pike commenced his exploration of the river in 1806. (Record, Pike's map; Corner's deposition, pages 1365 and 1366, Q. 30; page 1367, Q. 31 to 34; pages 1368 to 1371, Q. 35 to 36.)

It shows that the long stretch of the Arkansas River southeast from the apex of the great North Bend to the several contiguous and peculiar bends of the river about the mouth of the Salt Fork of the Arkansas River, of modern maps, which is the Jefferson River of Melish's map, exist on the ground. (Record, Corner's deposition, page 1367, Q. 31 and 32, and Exhibit B, of Corner's deposition.)

It shows that these peculiar bends of the river lie southeast from the apex of its Great South Bend, and northeast of the forks of Red River. (Record, Exhibit B of Corner's deposition.)

And it shows that these several great landmarks, as they exist on the ground, lie approximately in the same relative position to the line delineated by Melish for the 100th meridian of west longitude as they are represented to be on the map, and especially that the forks of Red River are west of that line (Record, page 1371, Q. 37 and 38; page 1372, Q. 39 to 46; page 272, Q. 28 and 29), and that all of the headwaters of both the North and South Forks, and also the mountains along the North Fork, lie west of that line as they exist on the ground. And the conclus-

ion is inevitable that the boundary line of the treaty, from Red River to the Arkansas along the meridian of the 100th degree west longitude, as laid down on Melish's map, lies east of the forks of Red River, and intersects the Arkansas River in the immediate vicinity and west of the apex of the Great North Bend of that stream, and also intersects the Red River at a point far below and east of the forks of that river, and lies far to the eastward of Greer County, and that this fact must have been fully understood and acted upon by both parties to the treaty since they made the 100th meridian, as laid down on this map, the boundary.

The parties to the treaty were well advised of the difficulty and uncertainty of determining with precision and accuracy the position of meridian lines at that day and time. They were fully informed that Pike, with the use of the astronomical instruments and appliances with which he was provided (Record, page 872), had laid down the 100th meridian of west longitude in reference to the Great North Bend of the Arkansas, about two degrees farther east than Melish had done, with the assistance of the recent surveys of Bringier.

The telegraph was then unknown, and the methods then in use of ascertaining the differences in time between Greenwich or Washington and the locality of the observer had proved too crude to be relied upon to fix with precision a boundary line; of which fact the parties to the treaty had a demonstration in the two maps just mentioned.

Hence the necessity of agreeing upon a diagram laying down the line of boundary in reference to great and stable natural landmarks upon a map, which should point out the unchanging and unchangeable localities had in view, to fix the position of the line.

Had the treaty been in 1806, and the absolute 100th meridian been made the boundary, and Pike been called on to mark it on the ground, he would have located it nearly two degrees east of the apex of the Great North Bend of the Arkansas River. (See his map.) But if the parties had surveyed the ground and made observations twelve years later with Bringier, whose data were adopted by Melish (Record, pages 86 and 87), the line would

have appeared to be two degrees farther west, where Melish laid it down; and had the survey been postponed till forty years more had elapsed, Jones and Brown would have made the line appear more than fifty miles still farther to the westward, and west of the apex of the Great South Bend of the Arkansas River, and at least three degrees farther west than its determination by Pike in the year 1806.

To suppose the treaty-makers intended a line whose position might be shifted with every improvement in methods and instruments used in making astronomical observations, when expressly declaring that it should be as laid down on the map of the treaty, in the midst of great and unmistakable natural land marks, is too unreasonable for discussion. It is worthy of remark, that after the treaty of boundary, Melish furnished his map to the historian Bonnycastle, and the latter published it in his New Spain as Melish's map in 1819, and that on its face the line of demarcation between the territories of Spain and the United States, indicated by a dotted line, is laid down as intersecting the Arkansas River at the Great Bend of that river (see Bonnycastle's New Spain); and that George Catlin's map of Indian Localities in 1833 still laid down the same boundary as intersecting that river at the same bend, where Melish laid down the 100th meridian, and corresponds to the line established as the boundary by Exhibit B, of C. Corner and his testimony, as we have just seen. (Record, page 171, Catlin's Map.)

We have seen it established by the Record, that the river on which were situated the old Taovaise villages, named San Bernardo and San Teodora, was known to Mesieres in 1778 as the Rio Bermejo of Nachitoches (Red River of Nachitoches). That the Taovaise Indians and their villages, San Teodora and San Bernardo, were identical with the Wichita Indians and their villages on the North Fork of Red River, and consequently that the Rio Bermejo of Nachitoches and the North Fork of Red River are the same river.

That the river Nueces on which the Spanish friars established missions at 112 miles east of Santa Fe, and the North Fork of Red River, and the Colorado River discovered by Gov. Onate eastward of Santa Fe in 1601, correspond to the same river.

That Mexican miners and a Mexican shepherd were residing on the North Fork as late as 1833, on the old road from Nachitoches to Santa Fe, and the ruins of an old house existed at the forks of Red River on the old road at that date.

That at that date the road referred to was an ancient one, then known as the Santa Fe and Nachitoches road, and traces of it still exist on the ground from that region down the river to the neighborhood of the Louisiana line in Northern Texas, and that it was frequented by Mexican traders in 1818 and 1819, and then known as the Santa Fe road.

That evidences of both ancient civilized and Indian occupancy of the North Fork have been found recently in the nature of ruins of villages, an irrigation ditch, crucibles, mining tools, Mexican metates, rectangular adobe and excavated circular structures, the remains of notched log huts, old chimneys and stone walls in ruins, in the vicinity of that old road and on the banks of the North Fork.

That these remains correspond to the road stations delineated by Humbolt on the Red River of Nachitoches, named San Calixto and Canoatinos, and the ruins below the forks correspond to Canesis and Quichicans.

That the Indian ruins on the North Fork referred to are the relics of Wichita and Taovaiase occupancy for 500 years, according to the testimony of a witness of complainants.

That anciently, before the memory of very old Indians, there was a large traffic with the Indians of the North Fork of Red River by traders both from Santa Fe and Nachitoches, over a deeply and well-worn wagon road, as shown by the road itself, still visible on the face of the country, and by the tradition handed down to Indian witnesses who have testified in this case for the complainants.

It is a matter of great importance to bear in mind, in this connection, that the fork of Red River near the 101st meridian on the Melish map is the principal fork of that river (Record, page 273), and that the North and South Forks, as now known, are the principal forks of the river. This can not be considered a mere coincidence, but results from Melish's knowledge of the country, and shows that these forks are laid down on his map.

Against these convincing facts counsel for complainants interposes the single suggestion, that as Melish obtained his information from Darby and Bringier (Record, pages 86, 87), who did not personally explore this territory, he could not have accurate knowledge of it. It may be conceded that Darby had never visited that section, but whether Bringier did does not appear. Each of them, however, had the benefit of the reports of Dr. Sibley and other explorers, before submitting their work to Melish, and were thus made acquainted with that region. This conclusively appears by references given below, which are not in the record and which have not been cited before.

3 American Journal of Science (1821), 15 to 46.

8 American Journal of Science (1824), 218 to 225.

As a matter of fact, Melish says the data for his map of the Spanish possessions (which included the Greer County region) was obtained from the map of Humboldt and from Pike's travels (Record, page 88), and both of these show accurate knowledge of upper Red River.

II.

If the treaty and map of Melish be disregarded, considered scientifically and historically, the North Fork is main Red River, and consequently the territory is rightfully part of Texas.

Scientifically the North Fork is the main river, because it is the permanent and longest stream, discharges annually the greater volume of water, and imposes its course upon the river at and below the confluence; and historically it is the main river, because it was first discovered and was named and known as Red River, while the South Fork was named Prairie Dog Town River.

It appears from the testimony of the witnesses J. C. Settles and Jarrett Todd that under instructions from the Attorney General of Texas they explored both streams from mouth to source, and found that the North Fork is the longer stream, and that the North Fork has twice as many tributaries as the South

Fork. (Record, pages 1023 to 1027, 1038 to 1042.) It does not appear from the Record that any other efforts have been made to determine by actual examination or measurement the comparative length and number of tributaries of these streams, nor to test the accuracy of this estimate, although this testimony was taken in December, 1892. (Record, page 1023.) General Marcy thought the rivers of about equal length, South Fork 180 and North Fork 177 miles. (Record, page 932.)

It appears from the testimony of Todd and Settles, that the South Fork had its head farther west, but that its course is nearly direct, while that of the North Fork is winding and tortuous, and hence that the distance of their sources from their confluence towards the west does not determine their comparative lengths. (Record, pages 1023 to 1027, 1038, Q. 10; pages 1039 to 1042.)

It is in evidence, and is not disputed, that at the present time the sand bed between the banks of the South Fork is wider than the bed of the North Fork, from the junction of its canyon sources to its confluence with the North Fork, a distance of 100 miles. (Record, page 402, Q. 6.) But the Record shows that the channel of the South Fork has undergone great changes, and that probably at the date of the treaty it was in fact the narrower of the two streams. The testimony of Gen. R. W. Johnson, United States Army, on this point is strong. (Record, page 1291.)

It is in evidence from quite a number of witnesses, that the tendency of the South Fork is to widen its great sand bed, below its head canyons, to a very remarkable extent. (Record, page 1074, Q. 14 to 17; page 1067, Q. 13 to 16; page 1050, Q. 77 to 89; page 1165, Q. 2 to 10; page 1166, Cross-Q. 2 to 8; page 1171, Q. 20 to 24; page 1182, Q. 13 to 17; page 1291, Q. 16 and 19; page 195, Q. 4 to 6.) By the witness William Kyle it is shown that near its junction with the North Fork, the Prairie Dog Town River channel has widened, where it used to be 300 or 400 varas, to a width of from half a mile or three-fourths of a mile to a mile in width; and this was ascertained by him by a resurvey, under an order of court, of old surveys formerly on the bank of the river, about which there was litigation, whose corners could be established, but which were found now to be, some of them, entirely in the river, and others partly in the

river. (Record, pages 1276 and 1277, Q. 31 to 38.) As to this fact there is no counter-testimony.

We unfortunately have not the dates at which those surveys were originally made, but at the rate of widening testified to by other witnesses, just referred to, we would have to go back to the date of the treaty of 1819 for a date when the South Fork must have had a much narrower bed than the North Fork.

Without regard to the comparative length and breadth of their beds, however, the North Fork is shown to be the principal river in reference to the most important attributes of a river, to-wit, the quantity of water which it furnishes and its permanency as a flowing stream, and for that reason it was and is the stream properly considered the Red River of Nachitoches; and if the 100th meridian of west longitude, as laid down on Melish's map, and designated in the treaty of boundary as the boundary line, lies as far west as the forks of Red River, then the North Fork should be deemed the boundary line, and the territory to the south of it, including Greer County, should be held to be Texas territory.

It is shown that its channel is sufficiently deep to carry a greater volume of water, and at high water its volume is greater than that of the South Fork.

That its channel is deeper and that its cross-section contains at high water mark more square feet, is conclusively shown by the testimony of Chas. Corner, a skilled engineer, who was employed by defendant to measure their channels, and did carefully measure both channels, and this is the only comparison of the two channels, by actual measurement of both their width and depth, which the record shows to have been made; and it appears therefrom that the area of the cross-section of the North Fork, at high water, is to the area of the cross-section of the South Fork, as 15,758.89 square feet are to 13,163.07 square feet, or that the former is greater than the latter by 2595.82 square feet (Record, page 1357 and 1363); and to these facts there is no conflicting testimony.

The testimony of Wm. Ish is to the effect that the banks of the North Fork are from two to four feet higher on an average than the South Fork banks, and that he has seen drift from high water

extending out perhaps a mile from the bed of the river at a height of from six to ten feet above the valley, and that the stream must have been about a mile wide when that drift was lodged there. (Record, page 1284, Q. 19 to 23.) There is no testimony counter to this.

It is also testified by the engineer Corner, who is shown to have had much experience in his profession in observing streams in reference to bridging them (Record, page 1350, Q. 9), that other things being equal, the North Fork has the greater flow of water, and the form of its cross-section indicates a greater velocity; and that from the apparent surroundings, the North Fork at the point of its measurement has a greater declivity than the South Fork has at the point of its measurement, *and that at their junction, the course of the North Fork is maintained in the united river for some miles below the junction, while that of the South Fork is deflected 31 degrees of the compass from its course above the junction; from which he says the inference is plain that the North Fork is the dominant stream, because there is no good reason why the South Fork should not have imposed its course on the waters of the North Fork, except lack of volume and velocity; and as to these facts there is no conflicting testimony.* This witness testified (Record, pages 1362, 1363) that the North Fork is the principal river, and in this connection said that the importance of a stream, if it is not a source of water supply and not navigable, is directly as its volume. One of the factors to determine the importance of a river is the area of the watershed, and the other factors, volume of rainfall and springs, relative porosity of the soils of the watershed, and evaporation; and he aptly said that if the area of the watershed were taken for the sum of the volume, the South Fork might appear to be the more important river and in this way the Pecos could be proved to be a greater river than the Hudson, and the Sahara desert more important to mankind than the Mississippi Valley. (Record, page 1363.)

He also testified to the porosity of the soil, and well known sinking of all waters of the plains in the direction of the source of the South Fork and its tributaries, and equally well known aridity of its watershed, and that the evaporation from the wide and shallow bed of the South Fork would be considerably greater

than in a narrower and deeper stream, and more so than in proportion to its width, because the sands underlying such a stream become appreciably hot and the whole volume of the river is warm; and that he knows that it rarely rains upon the watershed of the South Fork (Record, page 1363); and as to these facts there is no counter evidence.

Besides these particulars, he also mentioned, in comparison of physical features of the two streams, that might be deemed of importance to persons trading or traveling, that there is good grass, wood, and water in the valley of the North Fork; that it is good traveling; that the wood is along the east bank of the North Fork and the north bank of the united rivers, but immediately above the forks the banks of the Prairie Dog Town River are destitute of timber (Record, page 1364); and as to these facts there is no counter-testimony.

The testimony of nineteen witnesses of complainants is concurrent to the effect that there is more permanent and greater usual volume of water in the North Fork than in the Prairie Dog Town River, for a distance of at least 35 or 40 miles above their junction, to-wit:

Chas. Goodnight (Record, page 398, Q. 37; pages 401 and 402, Q. 1 to 8).

I. L. Barnett (Record, page 408, Q. 11; page 409, Q. 1 to 4, Cross-Q. 7 to 16).

John Burdick (Record, page 520, Q. 7 to 16).

J. T. Tierce (Record, page 454, Q. 5).

Geo. Grooms (Record, page 448, Q. 8).

Samuel P. Banks (Record, page 447, Q. 11 to 15).

Dave McBride (Record, page 376, Q. 9 to 11).

B. K. Wood (Record, page 369, Q. 13 to 18).

C. F. Doan (Record, page 356, Q. 12 to 16).

F. M. Maddox (Record, pages 332 and 333, cross-examination).

J. R. Byers, U. S. Marshal (Record, page 211).

J. G. Bogard (Record, page 209, Q. 12 to 14; page 210, Q. 17 and 18).

J. S. Elliston (Record, page 203, Q. 6, 9 to 12; page 204, Q. 205, Cross-Q. 1 to 7).

J. W. Wilson (Record, page 197, Q. 12).

J. R. Crouch (Record, pages 194 to 196, Q. 16 to 20, Cross-Q. 3 to 13).

A. J. Meers (Record, page 192, Cross-Q. 22 and 23.)

S. F. Stillwell (Record, pages 543 and 544, Q. 32, 33 and 38.)

R. P. Sanders (Record, pages 563 and 564, Q. 21 and 22; page 573, Cross-Q. 67).

Pat Dooling (Record, page 391, Q. 28).

To the same effect is the testimony of the following witnesses for the defendant, to-wit:

Jarrett Todd (Record, pages 1024 and 1026, Q. 20 to 38; page 1042).

J. C. Settles (Record, pages 1042 and 1043, Q. 2, 6, 8 and 12 to 14; pages 1045 to 1047, Q. 8 to 38; pages 1049 and 1050, Q. 62 to 77; page 1051, Q. 80 and 86; pages 1053 and 1054, Q. 19 to 37; page 1056, Q. 56 and 58; page 909, itinerary of Fragosa, July 3).

George W. Briggs (Record, pages 1066 and 1067, Q. 1 to 22; pages 1068 and 1069, Cross-Q. 8, 9, 11 and 12 to 15, and Q. 19).

James T. Pollard (Record, page 1079, Q. 20 and 21; pages 1080 and 1081, Q. 20 to 39; pages 1082 and 1083, Q. 45 to 53; page 1090, Cross-Q. 36 and 37; page 1091, Cross-Q. 38 to 47).

J. T. Crabtree (Record, pages 1098 and 1099, Q. 1 to 12; page 1100, Cross-Q. 7 to 13).

W. S. Pearson (Record, pages 1101 and 1102, Q. 1 to 20; pages 1103 and 1104, Cross-Q. 19 to 29, and Redirect-Q. 1 to 3).

W. E. Gates (Record, pages 1105 and 1106, Q. 1 to 14; pages 1107 and 1108, Cross-Q. 1 to 9).

H. C. Sweet, postmaster and surveyor (Record, pages 1112 and 1113, Q. 1 to 15).

S. H. Tittle (Record, pages 1120 and 1121, Q. 1 to 14; page 1123, Cross-Q. 8 to 15; page 1124, Redirect-Q. 1 to 4).

J. H. Swindells (Record, pages 1127 and 1128, Q. 21 to 31; page 1133, Cross-Q. 50.)

General W. L. Cabell (Record, page 1138, Q. 7 to 9; pages 1150 and 1151, Q. 60 to 64 and 68; page 1152, Q. 73).

John Peter Smith (Record, page 1155, Q. 10 to 13; page 1160, Q. 30 and 31).

Richard Collins (Record, page 1167, Cross-Q. 16 to 19; pages 1168 and 1169, Q. 24 to 27; Redirect-Q. 1 to 4).

J. E. Overton (Record, page 1170, Q. 3 to 13).

Jonathan Doan (Record, page 1182, Q. 6 to 12; page 1188, Cross-Q. 46 and 49; pages 1191 and 1192, Re-direct Q. 3 to 13).

Jose Martinez (Record, pages 1267 and 1268, Q. 107 to 116).

Wm. Ish (Record, page 1284, Q. 14 to 25).

General Richard W. Johnson (Record, page 1291, Q. 13 and 18; pages 1293 and 1294, Cross-Q. 21; page 1296, Re-direct Q. 2).

Chas. Corner (Record, page 1374, Cross-Q. 5 to 13; page 1375.

It is true quite a number of complainants' witnesses, perhaps one-third of the number named above, have testified to permament flow of the South Fork, but on examination of their testimony it will be found that most of them refer this permanent water to the canyons which form the South Fork, about 100 miles from the forks. See Goodnight's testimony, a witness of the complainants, for instance, who represents that the river below the canyon for 100 miles, to the forks of Red River, is usually a sand bed, with no visible water, except during freshets, and where its tributaries come in and run down a little way. (Record, page 398, Q. 22 and 23; page 401, Q. 1 to 6).

So with J. H. Richardson (Record, page 201, Q. 14; page 202; Cross-Q. 4 and 5).

With Pat Dooling (Record, page 390, Q. 14 to 19; page 391, Q. 28 to 30).

With J. I. Barnett (Record, page 408, Q. 10 to 12; page 409, Cross-Q. 1 to 4).

With J. T. Tierce (Record, page 454, Q. 4 to 7; page 456, Cross-Q. 13 to 15).

With J. M. Passmore (Record, pages 472 and 473, Q. 8 to 10).

With John Burdick (Record, page 519, Q. 13 to 17; page 521, Cross-Q. 12 to 16).

With S. E. Stillwell (Record, page 543, Q. 33 to 37).

It is also true that some of complainants' witnesses, a cow boy and several farmers and a singularly large number of black-

smiths, have testified that the volume of flow of the South Fork annually, including its freshets, is greater than that of the North Fork; but it does not appear that any of them were qualified to ascertain the comparative volume of the flow of the two streams, or ever attempted to make any measurement or keep any account or memorandum by which to ascertain the comparative volume of flow; but, on the contrary, it appears from the testimony of a majority of them that they never measured or kept account of the streams for that purpose, and only guessed at it from casual observation.

It is a matter worthy of consideration that a river does or does not furnish wholesome and palatable water for man and beast in considering its comparative importance. In this respect the record shows that the South Fork compares very unfavorably with the North Fork.

It is apropos to quote the language of General Marcy on this point. He says: "The water of Prairie-Dog-Town branch, from its confluence with the North Fork to within two miles of its head spring (about 100 miles), I found so bitter and unpalatable that many of the men became sick from drinking it. But one pool of fresh water was found throughout the entire distance; and the Indians told me they never went up this stream with their families if it could be avoided, for the reason that the nauseous water frequently proved fatal to their children. Hence it is not surprising that but little if anything should have been known of this repulsive region before my exploration in 1852." (Record, page 932.) On the other hand he says of the North Fork, at a point well up the river: "We have thus far found the country well watered, the soil in many places good, everywhere yielding an abundance of the most nutritive grasses, with a sufficiency of wood for all purposes of the traveler." (Record, page 98.)

Accordant with this is the testimony of J. R. Crouch, a witness for the United States, that people use the water of the North Fork all along, but that of the South Fork cannot be used at all, and there is no season when the North Fork can not be used. (Record, page 196, Cross-Q. 11 to 13.)

Also that of J. S. Elliston (Record, page 204, Cross-Q. 2 to 4).

Of Chas. E. Anderson (Record, page 341).

Of A. J. Meers (Record, page 189, Q. 23 and 24; page 191, Cross-Q. 16).

Of J. W. Wilson (Record, page 198, Q. 12; page 200, Cross-Q. 18).

Of E. R. Fletcher (Record, page 207, Cross-Q. 4).

W. F. Cummins found the water of the two streams much like General Marcy found it. (Record, page 980, Q. 12.)

Swindells, witness for defendant, found the South Fork so salty the horses could not drink it. (Record, page 1127, Q. 27.)

General Cabell found it the meanest he ever drank, and such as a man having to drink it once would never forget it. (Record, page 1140, Q. 17.)

These facts all agree with perhaps the most important facts of all relative to these rivers, that is shown by the Record, to-wit: That not only was the North Fork known as the Red River in the day of Governor Onate, in 1601, and as the Red River of Nachitoches, in the day of Mesieres, in 1778, but that as late as the early recollection of extremely old men now living it was still known to white men in its region by the same name, and only by that name or a Spanish equivalent; and by that name or its Spanish equivalent, only, it was commonly designated till 1852, when Captain R. B. Marcy, an officer of the United States Army, called it North Fork of Red River, and that after that date it still was well known as Red River, and commonly so called, in contradistinction to the Kecheaquehono or Prairie Dog Town River; while up to 1852 the latter was commonly known in this region to the whites as the Kecheaquehono or Prairie Dog Town River, only, but in Mexico was known as the Blanco and Palo Duro.

This is shown by the concurrent testimony of the following witnesses, to-wit:

Simon N. Cockrell (Record pages 1347 and 1348, Q. 1 to 14; pages 1355 and 1356, Q. 21 to 25).

Hugh F. Young (Record, pages 935 and 937).

Geo. B. Erath (Record, pages 941 and 943).

S. P. Ross (Record, pages 938 and 940).

Gen. H. P. Bee (Record, page 1221, Q. 12 and 13, pages 1222 and 1223, Q. 14 to 18).

Jose Martinez (Record, page 1261, Q. 17 to 18; page 1263, Q. 48; page 1264, Q. 51 to 82).

John S. Ford (Record, pages 1220 to 1222, Q. 6 to 27; page 1233, Q. 18; page 1237, Q. 42 to 43; page 1240).

Gov. L. S. Ross (Record, pages 953 to 955, Q. 1 to 16; page 956, Q. 19; page 958, Cross-Q. 29; page 962, Cross-Q. 23 and 24).

J. H. Swindells (Record, pages 1126 and 1127, Q. 10 to 20).

Gen. W. L. Cabell (Record, pages 1137 and 1138, Q. 5 to 11).

John Peter Smith (Record, pages 1154 and 1155, Q. 6 to 8).

Wm. Kyle (Record, pages 1273 to 1276, Q. 24 to 28).

Gen. Richard W. Johnson (Record, pages 1290 and 1291, Q. 5 to 16).

Solon A. Loving (Record, page 1297, Q. 3 to 5; page 1300, Cross-Q 26 and 27).

Thos. F. Roberts (Record, pages 1320 to 1322, Q. 1 to 19; page 1327, Q. 5 to 11).

Gen. M. B. Pearce (Record, page 1342, Q. 1 and 2; page 1343, Q. 3 to 7).

J. C. Settles (Record, page 1062, Q. 4 to 6).

Cassimero Romero (Record, page 423, Q. 7).

H. M. Kimball (Record, page 418, Q. 25).

Romero and Kimball are witnesses for the complainants, and are the only witnesses who have testified to the name of the South Fork at a date prior to 1860. They both testify that by Mexicans the South Fork was always called Palo Duro; and Kimball says the first time he ever heard it called Red River was about 1876, when he first came into Texas. (Record, page 418, Q. 25.)

The complainants have made an effort to show that the South Fork of Red River is called Red River, but it will be found on examination that none of the witnesses who have known it called Red River were acquainted with it prior to 1870 (Record, page 200, Q. 2, 15 and 16; page 207, Cross-Q, 2; page 356, Q. 8; page 357, Q. 19 and 20; page 377, Q. 14 to 19; page 384, Cross-Q. 85, Cross-Q. 88; page 379, Cross-Q. 8; page 388, Q. 2; page 389, Q. 7 to 10; page 407, Q. 2 to 8); and that the wit-

nesses Romero and Kimball, before mentioned, are the only witnesses whose knowledge of the stream reaches back to a period before 1870, and they testify that it was always called by the Mexicans Palo Duro.

Quite a number of Indian names have been elicited by complainants from witnesses James Mooney, Chaddle-Kaungky, Dave McBride, J. M. Passmore, and Charles Goodnight for the South Fork, and several versions of the meaning of its names.

James Mooney testified the Kiowa name is Pe-pa-edal, and the Comanche Pia-pashi-huny, meaning "Great Sand River." (Record, pages 316 and 317.)

Chaddle-Kaungky testified the Kiowa name is Pa-pau-edal, which means "big bed of sand and no water; white sand." (Record, page 650, Q. 4.)

J. M. Passmore testified that the Comanche name was "*Beapassa-honop*," *which means "father of little rivers."* (Record, page 473, Q. 13.)

Dave McBride testified that the Comanche name is Pia-Bashi-Hono, which he says means Red River, but of this meaning he is not certain on cross-examination; and that the Indians called the South Fork Prairie-Dog River (Record, page 377, Q. 17 and 18; page 385, Cross-Q. 93 to 100), and that they did not call it Pia-Pashi-Hono, "they said Pia-Bashi-Hono." (Record, page 387, Q. 8 to 12.)

Chas. Goodnight testified that the Comanches call it Kechiaquahony, meaning Prairie-Dog-Town River, from the plains down, and that from the Palo Duro Canyon up they call it what would be "riffling water" in our language. (Record, page 398, Q. 19 and 21.)

And to these terms may be added the Comanche name Parwatsup, meaning "river without water" or "dry river," to which Jose Martinez testified. (Record, page 1266, Q. 91.)

This evidence, however, obviously does not help the case of complainants.

It is significant of the justness of the cause of Texas that no witness, explorer, geographer, or historian ever claimed that the South Fork was named Red River, or was called Red River prior

to 1852. The boundary commissioners appointed by the President in 1886 were forced to admit this. (Record, page 271, Cross-Q. 17, 18; Record, pages 950, 952.) A. J. Meers, prior to his employment by the United States (Record, page 577), testified that he was "very much inclined to think that the North Fork of Red River was known by the Spaniards as the Rio Roxo of Nachitoches" (Record, page 191); and J. S. Elliston, another witness for complainants, said: "It has generally been understood that North Fork was the main Red River. All I could say is what I have heard older men say about the discovery of the two rivers, and that the North Fork was discovered first and was the main Red River." (Record, page 204.) General Marcy said in 1886: "For reasons which I will presently state, I have been unable to resist the force of my own convictions that the branch of Red River that I called the North Fork of that stream was what is designated upon Melish's map as Rio Rojo." (Record, page 932.) On the Melish map of 1823 "the Great Spanish Road" is laid down along the North Fork near the 100th meridian, which unquestionably shows that this road led to Nachitoches, and that the North Fork was then known as "Rio Roxo of Nachitoches." If it be conceded, against the overwhelming testimony in the case, that the South Fork discharges the greater volume of water, the North Fork is yet the river of the treaty and the main Rio Roxo of Nachitoches, because of its first discovery and historical designation as such, upon which there is no conflict in the testimony. It is well known that the Missouri is the real continuation of the Mississippi river (Record, page 1296), but it is no more competent to reverse history there, upon principles of justice and national honor, than to disrupt conditions which have existed on Red River for three-quarters of a century.

III.

Should the court determine all questions submitted against the State of Texas, including that of estoppel, there certainly can be no doubt of the right of defendant to insist that the intersection of the 100th meridian with the river be accurately fixed. This

has been done by Professor H. S. Pritchett (Record, pages 1194, et seq.), against whose conclusion not a syllable of testimony has been adduced, and the line should be established as found by him, 3797.3 feet east of the initial monument placed by Messrs. Jones and Brown in 1858.

CHARLES A. CULBERSON,
GEORGE R. FREEMAN,
M. M. CRANE,
Of Counsel for Defendant.

Office Supreme Court, U. S.
FILED.
FEB 26 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES

VS.

THE STATE OF TEXAS.

REPLY BRIEF OF EDGAR ALLAN,

Special Assistant to the Attorney-General,

Counsel for Complainant.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES

v.

THE STATE OF TEXAS.

No. 4, *Original.*

Reply Brief of Edgar Allan, Special Assistant to the Attorney-General, Counsel for Complainant.

JURISDICTION OF THE COURT.

It was intimated in a motion made before the court early in December last, for a reasssignment of this cause, that the question of the constitutional power of the United States to bring a State of the Union before a judicial tribunal other than such as might be selected by the State, would be again raised at the present hearing of the cause upon its merits.

The opening pages of the brief filed by the defence seem to indicate that purpose, when on pages 4 and 5, reference is made to the institution of this suit against the State of Texas *without her consent.*

Should this course be permitted by the court, we rely upon the brief upon demurrers, filed more than three years ago, and upon the decision of the court thereon, reported in 143 U. S.

The argument upon the question of the extent of the Federal judicial power in controversies between the Government of the Union and the States composing it was fully discussed before the court, carefully considered by it, and decided after mature deliberation. It will not, we think, be reconsidered now.

It seems hard to convince our friends upon the other side that, under such circumstances of irritation as have existed between the two governments involved in this suit, the framers of the Constitution never intended to "place the Government of the Union prostrate at the feet of the States," but, recognizing the dignity of the parties and the public importance of such controversies, provided for an impartial, immediate, and final arbitrament, by original suit in the court of last resort.

The proposition to reopen this question in the case suggests that, when the learned counsel for the defence penned the paragraph referred to,—

> "He wrote amid the ruins of his heart;
> They were his throne and theme; like some lone king,
> Who tells the story of the land he lost,
> And how he lost it."

Propositions of the Defence.

First.

From page 6 to 31 of defendant's brief the position is asserted, and sought to be fortified by numerous authorities, that the 100th meridian of the Melish map of 1818 is still a controlling line of boundary between the two govern-

ments. In other words, the actual 98th meridian is the 100th meridian of the treaty, and all the territory between those meridians and between the Red River and the Arkansas, rightfully belongs to the State of Texas.

(For argument on this point see original brief, pages 7 to 15 and pages 214, 215.)

All the authorities cited by the defence which rest on the principle that a party cannot avail himself by plea of "mistake" (p. 28, 29, def't's brief) recoil with fearful force against this gigantic claim to the vast domain to which they now assert title, in view of the conclusive evidence demonstrated by the record in this case, that the State of Texas has recognized the *true* meridian as the boundary from 1819 to 1886 and acquiesced in the formation of Territories and States and a ratification of treaties with various tribes of Indians, all of which parceled out as the public domain of the United States, the vast territory to which this claim is now, for the first time, asserted.

1. It may be conceded that the United States under the Spanish treaty of 1819, as well as by the Act of admission of March 1, 1845, stands in the relation of grantor or warrantor of the territory lying west of the 100th meridian; it may even be admitted that no question is raised on the part of the United States as to the legal effect of making the Melish map a part of the treaty in establishing the dividing line east and west according to the 100th meridian as erroneously laid down by Melish, 65 miles east of the confluence of the North and South Forks of Red River, and about 120 miles east of the true location of that meridian.

This contention might possibly have been maintained, had it arisen in the acts of the political powers of the Government in fixing the boundaries, or in a judicial proceeding like the one now before this honorable court, at

any time prior to the act of the Texas legislature of November 25, 1850, under which the State of Texas became the grantor and warrantor to the United States for valuable consideration of "all territory exterior to the limits and boundaries," which placed the initial point between the Federal territory on the one hand and the State territory on the other as "the point at which the meridian of 100 degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude." (See pp. 8, 10, 214 of compl't's original brief.)

Only once between the date of the treaty and the act of 1850 was there any controversy which may be construed as possibly involving that contention. This was in 1843, at the time of the Snively episode. (See pp. 187–8, original brief.)

As shown in former brief, the United States, in the correspondence regarding, and settlement of this question, maintained her right to the territory west of the Melish meridian, and the State of Texas accepted the proposition made by the United States in relation thereto.

The map of Emery and Abert of 1844 shows this very territory as embodying the Choctaw and Chickasaw country; the various treaties with those tribes for the lease, and later for the purchase of the identical stretch of country involved between the Melish meridian and the true meridian; and the organization of the Territories and subsequent admission as States of both Kansas and Colorado, were all exercise of the highest sovereignty and assertion of title on the part of the United States, without a murmur of disapproval or a point of protest on the part of Texas.

Texas was admitted as a State in 1845, just after the Snively raid, and it was two years after her admission that she accepted the position assumed by the United States touching that controversy. (See U. S. Stat. at Large, 1847, vol. 9, p. 168.)

In 1857 Jones and Brown surveyed the 100th meridian as recognized from that date to the present.

In 1858 boundary commissioners were provided for by act of Congress.

In 1859 Gov. Houston instructed the Texas commissioner to insist on the North Fork as the true boundary line, but not upon the Melish meridian, for that was 65 miles east of the forks; and Mr. Russell, with his instructions as to the treaty and treaty map, does not doubt as to the present meridian, and not the Melish meridian, being the boundary.

If it be true, then, as claimed by the counsel for the respondent, that the claim set up by Texas in 1843 was based upon her rights to the Melish meridian, is it not manifest that the attitude of Gov. Houston and the Texas commissioner of 1859–'60 was a recognition that this question had been forever settled by the compensation Texas received from the United States in 1850? (See pp. 12–15, 214 of original brief.)

The first twenty-seven pages of the brief filed by opposing counsel are devoted to the simple contention that the Melish meridian still governs as the boundary, notwithstanding the array of facts and the decision of this court in Cook *v.* U. S. (138 U. S. 156). And on page 27 they express a willingness to have rested the case upon that single contention but for the fact that the United States avers and seeks to avoid its binding obligation upon her, and seeks by the bill in this case to have the court "correct a mistake in the work of the high contracting parties."

We have neither in the pleadings nor the argument undertaken to controvert the position taken by respondent's counsel, that "Where the fact is equally unknown to both parties," &c., with the numerous authorities quoted on pp.

28–30 of their brief, "a court of equity will not interfere." In the bill in this cause we asserted that both of the high contracting parties were ignorant of the physical features of the stretch of country in dispute; but that if the King of Spain was familiar with them, and failed to communicate such knowledge to the other party to the treaty, then and in such case any ambiguity must be solved and construed in favor of the party whose ignorance was taken advantage of.

This position is not assailed, but the respondents in their answer (p. 14, record) say the country was well known to the King of Spain, and that he communicated his knowledge to the United States. If this be true, then each party had "equal information," and the rule relied upon by the defence must prevail.

But the defence is bound by its admission of its full acquaintance with the physical features of the country, yet the record is barren of evidence that this knowledge was communicated to the United States. On the other hand, pp. 922, 923, 925 of the record expose the barefaced boast of the Spanish representative that he gained concessions not hoped for by flattering the passions and playing upon the fears and ambitions of the United States minister. (See pp. 21–22 original brief.)

Proposition 2.

North Fork Claimed to be the Main River.

Counsel for the State of Texas differ widely from the contentions of their client as set forth in the attitude of Governors Houston, Roberts, Ireland, and Ross, as well as the position taken by each of the boundary commissioners, when they say (p. 31, brief) that the determination of whether the North or South Fork is the main stream

is of no avail in this controversy. They examined dozens of witnesses on this very question, and the principal testimony taken by the Texas commissioners in 1886 was upon this point. They reverse the attitude we relatively occupy when they apologize for the space occupied (nearly one-third of their brief) in its discussion. The insistence on the proposition that the North Fork was and is the main stream, is set forth in the answer to the bill in this cause, and the bulk of the testimony burdens the record with futile efforts to establish that fact.

Let us eliminate from this case all question on that point; let us admit that the stream must govern which was laid down on the Melish map, and where does the respondent stand?

The Empressario contracts under the law of 1823 and every map published containing the grants under that law show that the South Fork was recognized by Spain, Mexico, Coahuila, and Texas as the boundary stream.

The testimony of the witnesses Creuzbaur, Livermore, Beach, and Corner (all experts) show that the Rio Roxo of the treaty map coincides more nearly with the South Fork than with the North Fork. Nay, more; Mr. Corner, the only witness who combines scientific knowledge with personal observation, demonstrates in a map, the result of his combined sources of accuracy, that the North Fork is clearly laid down on the treaty map, with the Wichita mountains to the east and north of the stream, but shows with absolute assurance that the North Fork of that map is not the Rio Roxo or treaty stream.

Driven by the evidence of Mr. Corner from the position so long contended for, *i. e.*, that the South Fork was not laid down on the treaty map, it is the State of Texas and not the United States that finds it important to contend for a discovery of the main stream. They began

with Settles and Todd and, winding up with Corner, were wound up and cornered by all three of their experts.

With what assurance it can be claimed that for all time up to 1852 the South Fork had borne the name Prairie Dog Town River, I fail to find in this record (pages 59–52 def't's brief). They even quote Mr. Marcy (p. 60) as regarding South Fork as the main Red River. It is true he gave it as his judgment that the North Fork only was laid down on Melish's map, but he neither had the advantages of Creuzbaur, Livermore, Beach, or Corner from which to form an opinion; while his map was assailed for errors as soon as published, and it is in proof that he makes Salt Fork empty into North Fork instead of South Fork.

I ask my friends to point out to the court from this record who ever called the North Fork Red River for 25 years after the date of the treaty.

Why, Mr. Marcy is quoted (p. 61 def't's brief) as positively asserting that the South Fork was never delineated by any Spanish, French, or English name prior to 1852, but it was certainly known as early as 1788, for the defence have supplied the proof in the itinerary of Fragoso, who traversed it above, past, and below its junction with North Fork, and he knew it as the Rio Blanco both east and west of the forks, while the well-recognized Spanish name for North Fork was Rio de las Plumas, and its Indian name Mobetia Hono.

It is useless to pursue further this contention touching the names of these streams in 1819 in the face of the declaration on p. 62 of defendant's brief, that "The North Fork was known as the continuation of Red River at the time of the treaty and for more than a generation afterwards. It had acquired this name *exclusively* to its source." Let counsel point out when and where.

Surely counsel cannot have read, or have forgotten, Mr. Corner's Exhibit B ; the evidence of their own witnesses Pressler and Cummins ; the name by which Fragoso knew it ; and the declaration of Mr. Creuzbaur, which practically shows that in 1849 the North Fork was known as Dog river ; so appeared on De Cordova's map, which was recognized as the best map of Texas ever published ; used in the State land office until 1858 ; while during all his years of service as a draughtsman he never heard of Texas claiming a foot of the territory now contended for.

Much stress is laid by the defence upon the report and subsequent deposition of Capt. R. B. Marcy, whose claim as the first discoverer of the South Fork of Red River we have already treated in the original brief.

It must be borne in mind that Capt. Marcy had no doubt but that the South Fork was *main* Red River. On p. 53–4 of defendant's brief they quote a portion only from his itinerary. They should have completed the paragraph by the addition of the following words :

"Following up the stream about a mile we discovered that this good water all issued from a small stream that put in upon the north bank, and above this the bed of the main river was dry."

Speaking of South Fork (Same, p. 53, line 13), he says : "It was here 900 yards wide, flowing over a very sandy bed, with but little water in the channel.

The conclusions claimed by the defence (pp. 56–8, brief) from the testimony as to which is the main stream are remarkably bold.

First. That the North Fork "at the time of and long prior to the publication of the treaty map of Melish of 1819" was known as Main Red River by the Indians, Spaniards, Mexicans, and others.

We challenge a reference either to reliable oral or historical evidence which will show that that stream either before the date of the treaty or up to the year 1841 was known by any name other than Rio Tinto, Rio Negro, or Rio de las Plumas, while the following facts appear in regard to it. (See plaintiff's original brief pp. 112–32.)

The defendant proves by Solan A. Loving that the two streams were called "the Forks of Red River" in 1844 (p. 1300–1301, R.); that it was called North Fork by Capt. M. T. Johnson and others in 1848 (pp. 1256 and 1259, R.), while many Indian witnesses and the records of the Bureau of Ethnology show that those best acquainted with the country, to wit, Indians, never regarded the North Fork as Red River, or called it by any name that signified that stream.

Second. That South Fork was never known by any other name than Prairie Dog Town River prior to its discovery by Marcy in 1852.

This contention is absolutely negatived by the defendant's principal witness, Mr. Corner; by all the maps prior to Marcy's map of 1852; especially by all maps of the Empressario grants, including Pressler's map of 1858; and the utter disproof of this claim appears on the face of De Cordova's map of 1849, "it being the only one extant that is truly correct," in which the North Fork of Red River was called Dog Fork and the main Red River South Fork.

This map was published three years before Marcy's exploration, by an official in the Texas land office, compiled from those records and surveys which the State of Texas has seen fit not to introduce in evidence, and strongly suggests, since the South Fork was well known as the main stream before Marcy got there, that by some means he became confused in preparing his map and report, or, as

many witnesses have testified, the names of streams then underwent a change. (See, also, a letter of J. H. Strain, with map, p. 173, R.; also H. C. Sweet, p. 1113, R.)

It is true the defence sought by a centenarian witness, one Simon N. Cockrell, whom, on page 49 of their brief, they repudiate as their witness by erroneously describing him as a witness for the United States, that he knew the names of the only three streams which figure in this controversy as early as the year 1834, and he lived, moved, and had his being upon them from 1834 to '36. In our original brief, pp. 135–139, we demonstrated beyond peradventure of a doubt, that this old gentleman was not within 150 miles of either of the streams referred to, during the period of his Red River residence. It will be remembered that, among other things, he swore that Pease River was known by that name, and appeared as such on a Mitchell map which he saw at that time. Should there be a lingering doubt as to the worse than worthlessness of this witness's testimony, attention is called to the depositions of Chas. W. Pressler and Denis Corwin, found in the addenda to the record, printed within the last twenty days, in which these old and experienced State officials show that Pease River was unknown, undiscovered, and never delineated until 1857, Mr. Corwin being one of the discoverers and Mr. Pressler the first map-maker to lay down that stream on any map. They prove, in addition, that it was named in honor of Gov. Pease, and that this gentleman had not moved to Texas at the time Mr. Cockrell knew Pease River, being then only 22 years of age and a resident of Louisiana. (See pp. 35–38, addenda to R.)

Third and Fourth. The relative flow of water in the two forks and normal conditions of the streams, have been fully discussed in our original brief, and the evidence is,

we think, overwhelming in favor of the position that all the conditions which go to determine which of two forks is the principal branch, unite in favor of the South Fork.

In this connection especial attention is called to the difference in the opportunities relatively possessed by the witnesses for the United States on the one hand and for the State of Texas on the other to form a reliable or correct conclusion upon the point at issue.

It will be found by analyzing this branch of the testimony that nearly every witness relied upon by the State is limited in his knowledge because his observations were made during hurried expeditions through the country or have been confined within very narrow limits of observation and opportunity; while with a few, such as Settles, Todd, and Corner, they are employees of the State whose knowledge has been acquired for the purposes of this suit.

On the other hand, the plaintiff relies on Maj. J. W. Clous, who in 1868 discovered the head waters of the South Fork to be more than 100 miles farther west than the North Fork. C. Goodnight, in that country since '47, owning 60,000 acres, says the South Fork drains three times the country that the North Fork does, and for about 25 miles at its head it runs throughout the year (a condition which no witness has approached for the North Fork). A. J. Meers, official surveyor of Greer county, declares that even below the mouth of Elm the North Fork is not a running stream throughout the year, and that its channel of water in sight does not average wider than the South Fork.

J. W. Wilson has known the country for 40 years and says the head of South Fork has running water in it all the time, and even when the streams are dry the waterholes in the South Fork are the largest.

J. H. Richardson, a buffalo hunter from 1872, says that on the North Fork "you could travel miles without finding enough water to water your horse," while at the head of the South Fork the water was always running when he saw it.

E. R. Fletcher, an officer of Greer county, testifies to half a dozen tributaries of the South Fork, "all continual running streams, containing fish weighing up to nine pounds each."

Chas. Corner proves the washing away of a bridge over South Fork 2,000 feet long, while no one ever heard of a bridge over North Fork.

C. F. Doan says, "North Fork looks like a canal beside South Fork," and the latter runs more water, as shown by three years' observations. He has seen South Fork over 8 miles wide during a freshet.

W. E. Timmons. (See p. 78, original brief.)

Dave McBride has caught fish weighing from 30 to 40 pounds in South Fork, and known both streams twenty-three years (p. 78, brief).

Pat Dooling, old pilot for surveyors since 1870, says South Fork generally runs all the time through the canyon, and runs for 30 or 40 miles, except in some places standing only in holes.

I. L. Barnett says South Fork flows about five times as much water as North Fork.

A. L. Yeckley, known country since 1880, says South Fork carries more water annually.

J. T. James, an official of Greer county, says South Fork conveys three or four times as much water annually that the North Fork does, the latter being dry most of the time.

Geo. R. Grooms lives on North Fork, which does not discharge half as much water as the South Fork.

J. T. Tierce, known the country since 1880 from the

confluence of Forks to their head waters, says the South Fork is a running stream for about 30 miles near its head, while North Fork, in an ordinary dry spell, is dry from its head to the mouth of Elm (p. 82, brief).

J. M. Passmore. (Same as Tierce.)

John Burdick says the South Fork towards its head runs living water all the while 55 or 60 miles.

R. P. Sanders. This witness and Timmons both carried counsel across these streams several times and testify that the South Fork carries more water the year around. Indeed, the best relative conditions of flow presented to the gaze of counsel in this case when travelling together is described by these witnesses and Passmore as being up to the wagon body in the South Fork and not deep enough to cover an egg lying in the deepest part of the North Fork.

S. E. Stillwell, scout and guide for 30 years, police judge at El Reno city; and Chaddle Kaungky, a Kiowa judge, both say there is alway running water in the Canyon.

Defendant's Witnesses.

W. B. Kiser thinks South Fork flows the most.

Jonathan Doan, familiar with country since 1876, says Elm Fork flows more water than North Fork.

W. T. Cummings, assistant geologist of Texas, found North Fork dry above Elm whenever he saw it, and says the watersheds of South Fork are three times as great as those of North Fork.

It is on this testimony that this court must determine the preponderance of evidence instead of leaving the wavering balance in the hands of interested and enthusiastic advocates.

Proposition 3.

From p. 62 to 71 counsel for the defence contend for the proposition that the North Fork of Red River corresponds most nearly to the Rio Roxo of the treaty.

We have treated this branch of the subject from p. 37 to 51 of the original brief, and claim confidently the following conclusions of fact from the evidence on that point.

First. The evidence of Major Livermore, who was a civil engineer before Mr. Corner was born, and of Lieutenant Beech, instructor of engineering at the United States Military Academy, shows by a number of tests and measurements, as also by superposition, that the points of comparison and agreement between Melish's stream and the South Fork of Red River are almost identical, while divergences and differences of a determinative character appear at nearly every point when the North Fork of Red River is tested to find the treaty stream. But there is no need to rely upon these experienced officials, since we have shown that the expert engineer witness introduced by the defence has made assurance doubly sure on this point by demonstrating, through the medium of his Exhibit B, that both the North Fork and Prairie Dog Fork of Red River are laid down by Mr. Melish on the map referred to; and no amount of squirming on the part of this witness, can get rid of the fact that his combined advantages of scientific training, personal observation of the stream, and historical and geographical research, led him to lay before the court a demonstration that for some distance west of the confluence, Melish's Southern Fork, which at its head is called Rio Roxo, coincides with the South Fork of Red River; while the unnamed stream upon the treaty map which has the mountains on its east

and north sides, is identified by Mr. Corner as the North Fork of Red River. It is true that in his evidence he declares this North Fork of the Melish map to be the boundary stream, but the treaty called for a river named, and that stream has no name, while the South Fork contains the name of the treaty boundary. And again we refer to Melish's map of 1823 to show that when he received new light as to the physical features of the country, he recognized more clearly the insignificance of the North Fork and more emphatically the controlling force of the South Fork by changing the location of its head waters from a point 45 miles northeast of Santa Fé to a position nearly 100 miles southward. When this proof was elicited from the witness, counsel for the defence then sought to show that part of Melish's South Prong must be an imaginary line (see p. 1390, R., q. 25); but if the named stream be an imaginary line, upon what line of reason can its unnamed tributary be declared entitled to the name which the other stream bore?

PROPOSITION 4.

Under this head is asserted the exercise of jurisdiction and a claim of title by the Government of Spain prior and subsequent to the ratification of the treaty of 1819; a similar exercise of ownership by the State of Texas; and a recognition by such solemn acts of the Government of the United States of the right of Texas to the disputed territory, as operates an estoppel on the part of the United States from now asserting title to any of the territory exterior to the line of Melish's 100th meridian.

The evidence relied upon and referred to on pp. 74–75, defendant's brief, as to the expeditions of Coronado in 1541; Gov. Onate in 1601 and again in 1611; of Val-

verde in 1719; Bustamente in 1722; Mendosa in 1743; by Parilla, General Croix, and Col. Juan Bantista de Auza in 1778, and others are introduced in this record, nearly four years after this suit had been pending, as the result of research among old Spanish documents hitherto unpublished; and like the Fragoso itinerary of 1788, which was first brought to light in 1886, they can form no figure upon which to base proof that the slight knowledge possessed by these explorers was known to either of the contracting parties under the De Onis treaty of 1819; while the most critical analysis of these extracts fails to arouse even a suspicion that any of these ancient explorers knew anything of the region in controversy. The nearest approach to a location of any of these early explorers is, perhaps, to be found in the reference to Gen. Croix (p. 734, R.) and the letters of Mezieres, discussed on pp. 20–21 original brief, and show that the Red River referred to was the Canadian or Rio Colorado, as it was called by the Mexicans, and not either of the branches of the Rio Roxo de Nachitoches involved in this controversy. But if Spain or Mexico had, prior to 1819, exercised jurisdiction over all the territory west of the Louisiana line, that fact could not affect the issues in this suit, as to the rights which accrued under the treaty of 1819, except so far as it might tend to show that the South Fork of Red River, under the colonial grants to John Cameron and to Padillo and Chambers, was known and recognized as the line dividing the United Mexican States from the United States of the North when the Empressario acts were passed, three or four years after the date of the treaty.

An attempt to locate the boundary in dispute from these ancient records recalls a paragraph of Mr. Choate's argument in R. I. *v.* Mass., when he said:

"A boundary line between two sovereign States described by a couple of stones near a pond, and a buttonwood sapling near a village! The commissioners might as well have defined it as starting from a blue jay, thence to a swarm of bees in hiving time, and thence to 500 foxes with firebrands tied to their tails."

Whatever knowledge there may have been within the bosom of these travellers, was written out by them in the Spanish language and never made known to the world or ever referred to in the correspondence between the diplomats who negotiated the treaty of 1819. None of them can wipe out the fact recorded by Capt. R. B. Marcy in 1852, that up to that time "the basin of Upper Red River had always been to us a *terra incognita*," and "up to this time there is no record of any traveller having reached the sources of Red River" (p. 96, Record).

Not only does it appear that the Rio Colorado was the Red River usually referred to when speaking of the Upper Red River country, but the record of Philip Nolan (p. 736, Record) shows that the Colorado, on which the city of Austin is situated, was also called Red River, for it says, "the party crossed Red River in continuing their westward course, crossed the Trinity and reached the Brazos;" it also shows that they visited the Comanche village which was situated at the *South Fork* of the Red River. This was in the year 1800. Was the South Fork of Red River known as such then, and where is the location of this Comanche village upon it? It would be as interesting as it would be instructive if these translations from Spanish records were capable of furnishing intelligible information as to the route of travel of any of these writers.

But by far the boldest claim in this connection is the declaration on p. 76, that the Santa Fé road "led from

Santa Fé to the head waters of the North Fork and down the North Fork," and that this fact "indicates indubitably that North Fork was the only stream then known as the continuation of Red River," and on pp. 80–81 they say that counsel for United States claims "that the great Spanish road never existed along Red River."

If there was ever such a road which approached anywhere near to North Fork, I ask that counsel shall indicate to the court any one of the several maps which lays down the Santa Fé trail or Great Spanish road as going to the head of North Fork and thence down that stream. It is surely significant that Melish had no such road on the treaty map if it was as well known as counsel for the defence now claim. Examine his map of 1823 and we find that this Spanish road going from Santa Fé takes a direction northeastward to the Canadian or Rio Colorado; that it follows closely that stream in an eastward course for about 200 miles; turning then somewhat south of east, it crossed the Washita and does not strike Red River at all until it crosses that stream near the mouth of the Washita.

Carey and Lea's map shows the same general course of this stream, while witnesses like Prof. Cummins and the surveyors of that region know nothing of any such trail; but we have fully discussed the evidence on this question from pages 133–161 of the original brief. The most intelligent evidence on this point is that of the old scout S. E. Stillwell, H. M. Kimbal, Cassimero Romero, J. M. Robinson, J. M. Passmore, Horace P. Jones, and Dr. Sturm, but we have already devoted a page of the former brief (p. 166) to show that the Texas boundary commissioners of 1886 not only admitted, but labored to show that this old trail pursued the very route which we now claim; and we dismiss the subject by referring again to and relying upon the knowledge which these intelligent commissioners, Gov.

Herndon, Major Brackenridge, Mr. Burges, and one of the present counsel for the State, Mr. Freeman, possessed and published, as being more reliable than the fragmentary knowledge of some recent settlers who would patch a number of new roads together in order to establish the modern theory that the old trail skirted the North Fork.

Jurisdiction of Texas.

The remaining pages of defendant's brief are taken up by references to acts of jurisdiction over the disputed territory by the government of Texas.

We have shown, pages 179, 180, that there is nothing in the terms of any legislative enactment by the State of Texas prior to the act of February 8, 1860, defining the boundaries of Greer county (in fact, creating the territory and giving it the name of Greer), by which any possible deduction can be made that the territory now in dispute was included in the several statutes quoted on page 83 of defendant's brief. If Greer was thought of in connection with these acts, it was merely as a possible estate and residuary in its nature, because unknown and incapable of express reference.

A number of acts in relation to Greer, passed between the years 1860 and 1884, are cited to support the position that the county was under the jurisdiction of the State, assigned to political divisions for political purposes, and to judicial districts for other purposes of jurisdiction; but it must be borne in mind that a joint boundary commission was organized in 1859, and dissolved in disagreement over the very question now before this court, so that the claims of both governments were open and notorious during all the period of this asserted jurisdiction, and that Greer county was not designated as such until

the dispute took shape by the rival contention whether the North or South Fork of Red River should be regarded as a terminal point in the boundary. What, then, can such a claim to the assertion of title and jurisdiction amount to?

But the evidence as to the exercise of any jurisdiction for even 25 years after that period is more barren still. Will the learned counsel point out to the court any opportunity to do those things which the court is left to infer were done under the various acts of the Texas legislature placing Greer county in representative, senatorial, congressional, and judicial districts? Why, the record shows that Greer was without a white settler within its borders until May, 1884, and was the slaughter-pen of 57 wild buffalo in one day as recently as 1882. It would have been more appropriate to have named it Buffalo county. And is it not clear, or to be irresistibly inferred, that it was in pursuit of the same line of policy, when the act of Congress of 1879 organizing the northern judicial district of Texas was passed, that Greer county slipped into the bill, as was subsequently said by Congress, "by an inadvertence," and the measure passed, without discussion, under a call for the previous question?

We have discussed on pp. 187–88 of original brief the episode referred to as the Snively raid of 1843, and would not refer to it again but for the emphatic position taken by the defence in their brief (pp. 94–95) that the United States Government recognized the illegality of Snively's arrest; practically confessed the wrong done thereby; and, in effect, declared the territory where the arrest was made to be the territory of the State of Texas *and comprising what is now known as Greer county.* This is relied upon as an "act of estoppel, substantial, governmental, sovereign."

Both propositions are equally fallacious, the first, because the arrest of Snively was upon the Arkansas, and not on Red River, but hundreds of miles away from Greer county. (See ev. G. B. Erath, p. 941, R.; Yoakum's His. of Tex., vol. 2, p. 405.) The evidence before the military court of inquiry, referred to on p. 109, R., also establishes this fact, but was not published *in extenso* as part of the record since no contention or doubt existed on this point.

The second claim is equally without foundation. The diplomatic correspondence (pp. 138–9, R.), extracts from President's message (p. 137, R.) and from U. S. Stat. at Large, 1847, all negative this position, and there is not a scintilla of evidence to sustain the contention that the U. S. Government ever wavered from its claim that this arrest was on United States and not upon Texas territory. Surely counsel must have overlooked the findings of the court of inquiry, that Capt. Cooke "on the 30th of June, 1843, disarmed a Texan force under Col. Snively within the territory of the United States by causing them to lay down their arms under an appropriate exhibition of military force of United States dragoons," or they would never have fallen into the manifest error which surrounds their plea in this behalf.

This brings us, then, to the consideration of the claim that what has been done by the government of the State of Texas in its relations with Greer county since the year 1884 should be considered by the court upon the plea of estoppel, which is argued at great length and with much earnestness.

Many authorities are cited in defendant's brief in support of the view that, Greer county having been organized into a local government of the State of Texas, and having exercised all the privileges and performed all the duties of other citizens of the State since the year 1886, it

is too late now to disturb the existing state of things, and that the very thought of doing so "is enough to make civilization turn pale and to cause Greer-county people to lament that they were ever born;" while the horrid possibility that Texas might by the decision of this case lose a Representative in Congress and both her members of the United States Senate, should they happen to reside within the disputed territory, is suggested as one of the appalling spectacles possible unless the court shall determine this cause in favor of the State.

If this be true, what untold horrors await us should this case be decided in favor of the State of Texas, for the defendants claim (pp. 16–17, R.), as "belonging of right to Texas by virtue of her establishment of independence, a large part of the lands now belonging to the Chickasaw and other tribes of Indians, under concessions by treaty, as well as a portion of the present States of Kansas and Colorado, and a part of the Territory of New Mexico." * * * "and Texas, both as a separate republic and as a State of the Union, has claimed and exercised complete ownership and dominion over said territory, including the territory now in controversy, by occupation of said territory by her armies and by extending the operations of her laws over the same, and by various other acts and declarations, until the happening of the matters and things now here to be shown and set forth."

How the people of Colorado must be already trembling, and with what solicitude her Senators and some of her Congressmen must be watching the termination of this suit! And then, too, "poor, bleeding Kansas," threatened with the dismemberment and emasculation of all her territory south of the Arkansas and west of the 98th meridian! Have my friends no consideration for her Senators and Representatives, who, if the argument put forth is a valid

one, must meet the same fate, should Texas succeed in this controversy, that is presented with such impressive pathos in behalf of the unfledged residents of Greer county? My friends cannot be serious in this presentation, or else, when they have pictured to themselves their acquisition of this large portion of the State of Kansas, they must have forgotten that though—

> "John Brown's body lies a-mouldering in the grave,
> His soul goes marching on."

But what are the facts?

1st. The sovereignty of the United States was asserted by President Arthur's proclamation of 1884, when only about 10 settlers had asserted squatter sovereignty in Greer county.

2d. They would have been driven from their illegal foothold but for the importunities of the Hon. Richard Coke, U. S. Senator from Texas, declaring that the Government, by permitting them to remain, "can suffer no detriment in its claim to the land;" and the letters of Governor Ireland to the President and Secretary of War, admitting that the rival claim to this territory (of which Governor Ross had been cognizant for nearly half a century) had not been settled, but was on "the eve of an amicable adjustment."

These representations led, not to a revocation of the order or abandonment of the claim by the United States, but to a suspension of its operations and action "until further orders can be issued."

3d. This liberal action on the part of the United States, so as to avoid hardship to the few residents of Greer county about to be removed by military force, does not seem to have been met in a reciprocal spirit by the State of Texas, but, instead of maintaining the *status quo* pending an adjustment

the magnanimity of the Government was used as a license to fresh encroachments, and the people who flocked into Greer during the next two years were taken under the protecting wings of the State government and clothed with the political power and privileges pleaded now as a bar against the unwavering claim of the United States to this portion of her public domain.

The very next year, in 1887, President Cleveland issued his proclamation of protest and warning. But the State had now grown bolder, and when the commissioner of the general land office of the State of Texas hesitated to set at defiance the Presidential proclamation, the attorney-general of the State, J. S. Hogg (now ex governor), bid his subaltern officer to do the bidding of the State, ignore the claim of the nation, nullify the executive edict, and pledged immunity and indemnity to the residents of Greer in return for their co-operation in carrying out these plans and purposes. (P. 114, R.) See also letter of Gov. Ross (p. 115, R.) showing another movement to remove these settlers, begging further indulgence for them and pressing for a settlement of the very question now before this court by the political powers of the Government.

4th. The boast of the full exercise of sovereignty and jurisdiction by the State is hardly sustained by the record, for the highest attribute of sovereignty is the exercise of the power to tax, yet it appears that only one individual pays territorial tribute, and *that* by voluntary contribution to the treasury of the State, under the idea that it may affect his title to some 2,000 acres of land should the State prevail in this suit. (P. 1119, Record.)

5th. The State has repeatedly recognized that she did not rely upon the judiciary act of 1879 as having any bearing upon the disputed question as to title. She did this by solemn, legislative enactment May 2, 1882 (see pp.

90, 91, 92, original brief); and when Congress was asked, in 1885, to make Greer county a part of Texas, not by a judicial district bill, but by one defining the boundary, the governor of the State of Texas, recognizing the sole object of the judiciary act of 1879, declared that Congress did right when it adopted the report declaring the so-called annexation of Greer "an inadvertence," and submitted "a very proper substitute" by providing for boundary commissioners. These commissioners, under the terms of the Texas act, were required to do the very thing necessary—that is, ascertain which fork was the main stream of Red River—a task that would not have been delegated to them by the sovereign authority of the State if they ever construed or acted upon the act of 1879 as closing the controversy. No such ambiguity impedes the construction of this act of the Texas legislature as that which confronts us in the interpretation sought at this late day to be placed upon the act of 1879 by counsel for the defence.

6th. It is therefore confidently submitted that none of the acts of defiance relied upon, none of the privileges of cultivation without taxation, nor the injection of the votes of thousands of territorial subjects to swell the representative strength of the State of Texas can, under these circumstances, avail to support the plea in bar.

The Act of November 5, 1850.

It would have been a source of satisfaction to have furnished amusement to the learned counsel for the defence, such as they give credit for on p. 98 of their brief, but this cannot be done when it involves the necessity of their enjoying themselves under a misapprehension. Counsel for the United States has never contended for the position

that the right of the United States to Greer county was settled when the State of Texas, in 1850, relinquished her claim to all territory exterior to certain limits, one of which was the 100th meridian as an eastern point and 36° 30″ as a northern point. On the contrary, we have contended that the record is barren of any evidence tending to show that the State of Texas has ever established a boundary east and west, except the true 100th meridian, or attempted to exercise jurisdiction over any of the vast territory between that line and the Melish meridian at any time since her independence from Mexico, except Greer county.

We have simply put forth the argument that if there was any doubt as to the meridian under the treaty terms, there could be none as to the intention under the act of 1850, and that such intention had been uniformly recognized by the State of Texas in her legislative enactments, through her boundary commissioners, by the instructions given to them, and in all the surveys made in that region from the date of that act until the bringing of this suit.

If Greer county became United States territory by virtue of the act of 1850, it must be either because as Mr. Chas. Corner has demonstrated, the South Fork of Red River was laid down on the treaty map as the Rio Roxo, and is, therefore, the boundary stream; or, otherwise, that the weight of evidence in this cause shows that fork to be the main prolongation of Red River in going up the stream from the confluence of the two forks.

All our argument that Texas is concluded by the act of 1850 applied to the claim set up that the rights of the parties were still governed by the Melish meridian. (See pp. 7–10, original brief.)

On this subject of the meridian line counsel have referred to the fact that Marcy's 100th meridian was about midway between Melish's and the meridian as recognized

to-day, but they fail to state in that connection that Marcy was not equipped with the paraphernalia for locating lines of longitude; and that nobody has ever claimed to recognize anything authentic or trustworthy in the designation of a point ascertained and determined without a chronometer, but by the aid of a pocket lever watch, used hundreds of miles distant from communication with civilization, and long after any opportunity to test its accuracy. (See R. B. Marcy, p. 933, R.)

We conclude, therefore, that the possession of Greer county by the State of Texas has not been such possession as brings the present case under the rule of any of the authorities cited in the defendant's brief—from Vattel on the Law of Nations, pp. 365, 356, down to the recent decision of this court in the case of Virginia *v.* Tennessee, 148 U. S. 503; that there was no "present state of things" at any time prior to 1884, such as appeal to courts not to disturb them, because of the injuries, vexations, and losses likely to be occasioned thereby. Certainly there has been no acquiesence in any of the acts done by Texas since 1884, against the protest of all the Departments of the United States Government, including Presidential proclamations, military possession, exercise of authority by the General Land Office (pp. 328, 329, R.), the several acts of Congress heretofore referred to, and by the judicial department of the Government when it enjoined the officers of the State of Texas from collecting taxes. (See Gov. Ross, p. 960, R.; and see blue-print map No. 3, with record of boundary commission of 1886, showing Greer county as part of leased district, Choctaw and Chickasaw country.)

It is upon an array of facts, overwhelming and convincing, and not upon flimsy theories or shadowy claim, that the United States now ask that her title, jurisdiction, and

sovereignty to and over the territory in dispute shall be no longer invaded by thousands of irresponsible land-grabbers, encouraged in their defiance of law by the support received from the authorities of Texas, which was never in contemplation when the Government stayed the military from ejecting the intruders. The principal facts relied upon are as follows:

The recognition by Spain and Mexico, before Texas became an independent government, that the South Fork of Red River was the dividing line where the Cameron grant on the one side, and the Padilla grant on the other, recognize that stream as the boundary line referred to in the Spanish contracts made with those parties.

That the records of the Texas land office, from which Mr. Pressler compiled his map of 1867, clearly establish this recognition of Prairie Dog Town River at the 102nd meridian, about 40 miles farther west than the head waters of North Fork.

That all questions affecting the meridian were set at rest by the act of 1850 and that line has been recognized as correct and undisputed until more than two years after this suit was brought.

That the South Fork of Red River is the main stream, and not the North Fork—being longer, wider, draining three times the area of territory, and discharging a greater annual flow of water at the forks than does the North Fork.

That the Rio Roxo of Melish's map of 1818, west of the forks, represents the South Fork of Red River as laid down thereon.

That Melish's map of 1823 emphasizes the intention of the treaty map to make that stream the boundary line.

That North Fork of Red River was not known by any English name at the date of the treaty or ever delineated

on any map by any name prior to 1852, but was an unnamed tributary of the Rio Roxo on the map of the treaty.

That the territory called "Greer" was part of a wild and unsettled country, unsettled by white men up to the year 1884, and therefore not the subject of such acts of jurisdiction as contemplated by law, so as to operate an estoppel against a rival claimant.

That the judiciary act of 1879 neither by implication nor intent can be construed as a surrender of the claim of the United States and was not so construed and acted upon by the State of Texas.

That all the acts of jurisdiction in the organization of a local government in Greer and the maintenance of the same therein were not in contemplation when the United States military, in 1884, was temporarily restrained from turning out the few intruders therein; were not fairly responsive to the liberal conduct of the United States Government; and, rather than being the subject of a plea in bar, they constitute aggravation of the original, unauthorized acts of the settlers, who held no title under any government.

We cannot conceive, in the light of the array of facts just cited, how counsel for the State could contend that the bill in this cause seeks to take this territory from Texas upon a theory "promoted by irresponsible subaltern army officers and land speculators" (p. 89, brief) and we offer them "a Roland for their Oliver," by calling attention to the evidence (pp. 334–43, R.) to show that, on the contrary, witnesses for the State had been procured and the expenses of investigation paid by a certain land and cattle company located in Austin, Texas, which was anxious to secure 144,000 acres of this very land if it could secure the title to Texas. This was shortly after the time when the

governor of the State of Texas had written his remarkable message to the legislature showing that while another land speculator (Col. Swisher) had faith in the claim of Texas, others doubted or despaired of its success (pp. 104–107, Record.) This was the governor's view four years after the judiciary act of 1879.

Surely the zeal of the learned counsel had parted company with discretion when they asserted that, after all the acts of jurisdiction alleged under the present local and State government of Greer, "suddenly it is found out by some wandering scientist, from observations on the Dog Star (Prairie Dog Star, perhaps) or the Milky Way, possibly, that this is all wrong and Greer county is not Greer county."

We have not made the acquaintance of this scientific associate of the Dog Star, and confess to an inability to locate him in the record, though we have sometimes felt that "the Great Bear" had treated us with a little surly disrespect. The allusion of counsel to the "Milky Way" was an unfortunate suggestion for them to make in this cause, for pious teachers of old taught the lesson that the Milky Way was the faded azure of the skies, caused by the tramping footsteps of the fallen angels in their descent from paradise, when driven out for the rebellious attempt of the creature to usurp the sovereignty of the Creator.

No such dire calamity, however, hangs o'er the heads of the 18,000 residents of Greer county; but when this honorable court shall have forever terminated this trouble, and the present Territory of Oklahoma shall have received that accretion to its population, then, without dimming the lustre of the Lone Star State, they will shine through reflected light in a new constellation on our national banner, when the present Territory shall become the future State.